Feb. 17. 1875
Motion to advance
Filed
Filed 22 Dec 74
Knapp

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 364.

CHARLES R. TUCKER, OLIVER PRESCOTT, AND SHEPHERD KNAPP, APPELLANTS,

vs.

NELSON FERGUSON, JOHN H. LAMPHIER, WILLIAM BENNETT, ELIAS C. MARTIN, CHARLES F. DEREVAGE, AND NATHANIEL CLARK.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MICHIGAN.

FILED JANUARY 12, 1874.

Oct. Term, 1874

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1 THE UNITED STATES OF AMERICA:

To the honorable the Supreme Court of the United States:

Return of Isaac H. Parrish, clerk of the circuit court of the United States for the sixth judicial circuit and western district of Michigan, to the appeal taken by the complainants in a cause wherein Charles R. Tucker, Oliver Prescott, and Shepherd Knapp are complainants, and Nelson Ferguson, John H. Lamphier, William Bennett, Elias C. Martin, Charles F. Derevage, and Nathaniel Clark, are defendants, to wit:

2 The circuit court of the United States for the sixth judicial circuit and western district of Michigan. In equity.

CHARLES R. TUCKER, OLIVER PRESCOTT, AND Shepherd Knapp, complainants,
vs.
NELSON FERGUSON, JOHN H. LAMPHIER, William Bennett, Elias C. Martin, Charles F. Derevage, and Nathaniel Clark, defendants.

The complainants in the above-entitled cause, on the 20th day of August, A. D. 1873, appeared by their solicitor, Wm. L. Webber, and filed in this court their bill of complaint, which is in the words and figures following, viz:

3 To the judges of the circuit court of the United States for the western district of Michigan:

Charles R. Tucker, of New Bedford, Massachusetts, and a citizen of the State of Massachusetts, and Oliver Prescott, of New Bedford, Massachusetts, and a citizen of the State of Massachusetts, and Shepherd Knapp, of the city of New York, a citizen of the State of New York, trustees as hereinafter named, bring this their bill against Nelson Ferguson, John H. Lanphear, William Bennett, Elias C. Martin, Charles F. Derevage, and Nathaniel Clark, all of whom are citizens of Michigan, and reside in Osceola County, in the western district of Michigan; and thereupon your orators complain and say:

I. That by act of Congress, approved June 3, 1856, entitled "An act making a grant of alternate sections of the public lands to the State of Michigan, to aid in the construction of certain railroads in said State, and for other purposes," there was granted to the State of Michigan, to aid in the construction of railroads upon certain routes in said act named, every alternate section of the unsold public lands of the United States, within certain limits also named in said act, on each side of said routes respectively.

That one of the routes in said act named was for a railroad from Pere Marquette to Flint, and the legislature of the said State of Michigan was by the said act authorized and empowered to dispose of the lands in said act mentioned for the purposes in said act named, and for no other.

And your orators refer to the said act of Congress, and pray that the same may be taken as a part of this bill as fully and effectually as though the same were incorporated therein.

II. Your orators further show that in the year 1857, and prior to the 14th day of February, in said last-named year, a corporation was formed pursuant to the act of the legislature of the State of Michigan, entitled, "An act to provide for the incorporation of railroad companies," ap-

proved February 12, 1855, under the name of the Flint & Pere Marquette Railway Company, which corporation was formed for the purpose of constructing, operating, and maintaining a railroad within the State of Michigan, from the city of Flint, in the county of Genesee, northerly and westerly to Pere Marquette, on Lake Michigan, a distance of about one hundred and seventy miles; and that the articles of association by which said railway company became incorporated were duly executed, stock thereunder subscribed, and payments made thereon in conformity to said general railroad law, and said articles were duly filed, so that said railway company became and was a corporation under the laws of Michigan, duly authorized to transact business as such prior to the 14th day of February, 1857, and has continued in existence as a corporation to the present time.

III. Your orators further show that the legislature of the State of Michigan accepted the grant of alternate sections of land which was made by the act of Congress hereinbefore mentioned and referred to, and disposed of said grant for the purposes named in said act of Congress, which acceptance and disposition were made by an act of the legislature of the State of Michigan, approved February 14, 1857, entitled "An act disposing of certain grants of land made to the State of Michigan for railroad purposes, by act of Congress approved June 3, 1856."

That in disposing of said grant the legislature of Michigan disposed of, granted to, conferred upon, and vested fully and completely in the said Flint & Pere Marquette Railway Company all the lands, franchises, rights, powers, and privileges which were or might be granted and conferred in pursuance of said act of Congress to aid in the construction of a railroad from Pere Marquette to Flint, to aid in the construction of the railroad of the said Flint & Pere Marquette Railway Company.

That by the terms of said act of February 14, 1857, it was, among other things, provided that the lands, franchises, rights, powers, and privileges conferred upon said railway company should be exclusively applied in the construction of its said railroad, and that said lands should be applied to no other purpose whatsoever. Said act also provided that said railway company should, by a vote of a majority of the directors thereof, accept of the lands, franchises, rights, powers, and privileges, and should accept, assent, and agree to the provisions and requirements of said act, which acceptance and agreement were required to be in writing, and filed in the office of the secretary of state of Michigan within sixty days after the passage of said act.

IV. And your orators state that the said Flint & Pere Marquette Railway Company did, on or about the 2d day of April, 1857, in compliance with said act, file in the office of the secretary of state of Michigan, a written instrument signed by its president, duly attested by its secretary and the seal of the company, as required by said act, which instrument accepted said lands, franchises, rights, powers, and privileges, and assented and agreed to the provisions and requirements of said act. Said act also required said railway company to locate the line of its road, to make maps thereof, and to file copies of such maps in the office of the governor and secretary of the State of Michigan. All of which said railway company complied with, in the manner and within the time required, in due season.

And your orators refer to said act of the legislature of the State of Michigan, approved February 14, 1857, and hereby make the same a part of this bill, as fully to all intents and purposes as if the same were at large incorporated herein.

V. The said State of Michigan, by its legislature, afterwards passed

several acts relating to the subject-matter of said land-grant, and for the benefit of the said Flint & Pere Marquette Railway Company alone, or in connection with other companies named in said several acts, some of which were by way of amendment to said act of February 14, 1857, which said several acts are entitled and approved as follows:

First. An act entited "An act to amend an act entitled 'An act disposing of certain grants of lands made to the State of Michigan for railroad purposes, by act of Congress approved June 3, 1856,' approved February 14, 1857," approved February 3, 1858; which amends section 19 of said act of February 14, 1857.

Second. An act entitled "An act to amend an act entitled 'An act disposing of certain grants of land made to the State of Michigan for railroad purposes, approved June 3, 1856,' approved February 14, 1857," approved February 14, 1859, which amends section 7 of said act of February 14, 1857, and further provides that said railway companies, including said Flint & Pere Marquette Railway Company, should be subject to the same rate of taxation only, and in the same manner as provided in section 45 of the general railroad law, which section 45 imposed a specific tax of one per cent. on the capital stock of said company paid in, which specific tax was in lieu of all other taxes upon the property of said company, whether real, personal, or mixed.

And the said act of February 14, 1859, repealed all contraven-
4 ing acts, except an act for the relief of railroads in the Upper Peninsula, and was ordered to take immediate effect.

Third. An act entitled "An act to repeal section 20 of an act disposing of certain lands for railroad purposes, approved February 14, 1857," approved February 15, 1859.

Fourth. An act entitled "An act to amend an act entitled 'An act disposing of certain grants of land made to the State of Michigan for railroad purposes, by act of Congress approved June 3, 1856,' approved February, 14, 1857," approved February 11, 1861; which act amends section 19 of the act of February 14, 1857.

Fifth. An act entitled "An act to amend an act entitled 'An act disposing of certain grants of land made to the State of Michigan for railroad purposes, by act of Congress approved June 3, 1856,' approved February 14, 1857," approved March 11, 1861; which act amends section 7 of the act of February 14, 1857.

Sixth. An act entitled "An act relative to the conferring and forfeiting certain land-grants made by the State of Michigan, by an act disposing of certain grants of land made to the State of Michigan for railroad purposes, by an act of Congress approved June 3, 1856, approved February 14, 1857, and the act amendatory thereto, approved March 19, 1863.

Seventh. An act entitled "An act to amend an act entitled 'An act disposing of certain grants of land made to the State of Michigan for railroad purposes by an act of Congress approved June 3, 1856,' approved February 14, 1857," approved March 21, 1865.

And your orators refer to the said several acts of the legislature of Michigan, in the last seven clauses mentioned, and hereby make them, and each of them, part of this bill, as fully and effectually as though the same were incorporated at large herein.

VI. Your orators further state that the said Flint & Pere Marquette Railway Company, after its acceptance of said grant, proceeded with the construction of its said railroad; and that the governor of the State of Michigan certified as completed, in accordance with said legislation, in September, 1860, twenty miles; in January, 1863, thirteen and seven-

tenths miles, being from East Saginaw to Flint; in January, 1868, twenty miles; in December, 1868, six and fifty-five hundredths miles; in January, 1871, twenty miles, and in December, 1871, forty miles, making in all, to the date last mentioned, one hundred and twenty and twenty-five hundredths miles of railroad completed in accordance with said legislation; and that the said Flint & Pere Marquette Railway Company had been granted by Congress further time, in addition to that specified in the act of Congress of June 3, 1856, for the completion of its road; that the further time so granted has not yet expired, and the said road is as yet uncompleted; that there remains to be completed about forty-eight miles, to wit, that portion of said road from Reed City westerly to Pere Marquette, the western terminus of said road.

And your orator aver and states that the said Flint & Pere Marquette Railway Company has, in all things and in due season, complied with the terms and requirements of said legislation and said grant, and is entitled to all the rights, franchises, exemptions, and privileges in said legislation and in said grant contained.

VII. Your orators further show and state, that the said Flint & Pere Marquette Railway Company having complied with the terms and conditions essential to entitle it to the benefits of the said act of Congress of June 3d, 1856, and to the land-grants made by said act for a railroad from Pere Marquette to Flint, lists of the lands embraced in the grant and to which said company was entitled, were made at the General Land-Office of the United States at Washington, which lists were approved by the Secretary of the Interior, and which lists embrace such lands only as were recognized by the Commissioner of the General Land-Office and Secretary of the Interior as falling within the grant of said company; that said lists embraced of land, within the county of Osceola, in the State of Michigan, about 28,598.69 acres; and that said railway company and your orators have since sold of the lands in said county about 17,705.72 acres, leaving unsold in said county and now belonging to said railway company, subject to the claim and lien of your orators as herein stated, 10,892.97 acres, nearly all of which lands, so embraced in said grant and still held unsold, are specifically described in the schedule hereto annexed, marked "Schedule A," and which schedule your orators pray may be taken as part of this bill; that the said Flint & Pere Marquette Railway Company, to enable it to raise money for the purpose of constructing its said railroad, did, by a certain mortgage and trust-deed, bearing date September 25th, 1866, convey to your orators, as trustees, one hundred and fifty-three thousand and six hundred acres of land, being parcel of that embraced within said grant, as security for bonds to the amount of five hundred thousand dollars, which bonds were issued and sold, and which are now outstanding in the hands of divers persons unknown to your orators, excepting such portion thereof as has been taken up and cancelled from the proceeds of lands sold for that purpose; that your orators accepted the trust created by said deed, and that said trust-deed contained a power of sale and terms and conditions for the management of the trust; and your orators refer to said trust-deed, and ask that the same may be considered as though it were set out in this bill. Subsequently the said railway company, desiring to raise a further sum of money to enable it to prosecute the further construction of its road, executed and delivered to your orators a further mortgage and trust-deed, bearing date September 4th, 1868, by which the said Flint & Pere Marquette Railway Company mortgaged and conveyed, upon the trusts in said deed mentioned, all

of the lands embraced within the land-grant, excepting the two hundred and forty sections of land previously mortgaged and conveyed to your orators in 1866, as above stated; and also excepting two hundred and forty sections embraced in a prior trust-deed executed by said railway company, in 1860, to Myron H. Clark and James M. Edmunds, and said Shepherd Knapp, one of your orators; and that said trust-deed, so executed to your orators in 1868, as aforesaid, was for the purpose of securing bonds to the amount of two million five hundred thousand dollars, which bonds were issued and sold upon the market; and your orators, as trustees, were to hold said lands, together with other property in said trust-deed mentioned, as security for such bond-holders; that your orators accepted the trust created by said trust-deed so dated in 1868, and entered upon the execution thereof; and your orators refer to said mortgage and trust deed so made in 1868, and pray that the same may be taken as a part of this bill; that there had been issued and sold, and were still outstanding in the hands of purchasers on the first day of January, 1873, of the land-grant bonds secured by the trust-deed dated in 1866, the sum of one hundred and forty-six thousand dollars, and of the land-grant bonds secured by the trust-deed aforesaid, dated September 4, 1868, the sum of two million two hundred and twenty-four thousand dollars; and all the lands embraced in Schedule A, hereto annexed, are held by your orators as trustees, as aforesaid, as security for said outstanding bonds; that the moneys received from the sale of said bonds so secured by the mortgages and forty-six deeds aforesaid to your orators, has been used and applied by said company exclusively to aid in the construction and equipment of its said railroad; that all of the said lands so held by your orators, in said county of Osceola, lie in the
5 following townships, to wit: the township of Orient, being township seventeen (17) north, of range seven (7) west; and the township of Sylvan, being township eighteen (18) north, of range seven (7) west; and the township of Evart, being township seventeen (17) north, of range eight (8) west; and the township of Osceola, being township eighteen (18) north, of range eight (8) west; and the township of Hersey, being township seventeen (17) north, of range nine (9) west; and the township of Richmond, being township seventeen (17) north, of range ten (10) west; that the said defendants are the acting supervisors of said townships, to wit: Nelson Ferguson, of the township of Orient; John H. Lanphear, of the township of Sylvan; William Bennett, of the township of Evart; Elias C. Martin, of the township of Osceola; Charles F. Derevage, of the township of Hersey; and Nathaniel Clark, of the township of Richmond.

VIII. That the said defendants, acting as supervisors of their several townships aforesaid, have made out their assessment-rolls and listed lands therein for assessment, upon which to apportion and extend taxes to be levied in said townships respectively for State, county, township, and other purposes for the year 1873; that embraced in said lists are the lands mentioned in Schedule A, hereto annexed; and that each of said defendants claims that the lands so held by your orators, and described in Schedule A, are subject to taxation, and liable to be taxed for State, county, and township purposes, by local taxation, in the same manner as the lands of individuals are taxed; and that said defendants, as such supervisors, propose to take their said several assessment-rolls, upon which the lands so held by your orators as aforesaid are listed, before the board of supervisors of said county of Osceola, at its annual session to be hereafter held, and to include in the aggregate valuation of the taxable property of said townships the lands so held by your

orators and embraced in Schedule A, hereto annexed, to make up a part of the aggregate valuation of the taxable property of said county at the time of the equalization thereof, to be had by said board of supervisors, to form a basis for the apportionment of taxes, as provided by the laws of Michigan in that regard; and said defendants, as such supervisors, further propose and intend, each upon the separate roll for his township, to apportion, assess, and extend the amount so to be apportioned to said townships respectively upon each description of land listed and set out in said rolls, including the lands held by your orators as aforesaid; and said defendants, as such supervisors, will proceed so to do, as your orators believe and charge, unless they shall be restrained by injunction from so doing.

IX. Your orators claim that the acts of said defendants, as such supervisors, in listing said lands of your orators, in said Schedule A mentioned, are illegal and oppressive; that should they be permitted to extend taxes upon the lands of your orators as aforesaid, the same will by the statutes of Michican become a prima-facie lien upon the lands so assessed, on the first Monday in December of the year for which the same were assessed, and will become a cloud upon your orators' title, which your orators are entitled to have prevented from accruing by injunction.

X. Your orators state that they are advised, and believe to be true, that the said Flint & Pere Marquette Railway Company held the lands at the time of the execution of the mortgages and trust-deeds aforesaid, free and exempt from local taxation; that, by the legislation and agreements hereinbefore mentioned, and the construction by said company of its railroad as stated, an irrevocable contract was made that said lands included in said land-grant, and including those in Schedule A mentioned, while they should remain unsold, should be held free from local taxation; and that the State of Michigan is prohibited by that clause of the Constitution of the United States prohibiting States from passing laws impairing the obligations of contracts, from passing any act authorizing the taxation of said lands.

XI. Your orators further state that by an act of the legislature of Michigan, approved April 18, 1871, entitled "An act to revise the laws providing for the incorporation of railroad companies," it was, in section 37 of said act, among other things, provided that the railroad companies, under the provisions of said act, should pay a specific tax upon gross receipts computed as therein stated, and providing that only such lands granted to any railroad company shall be liable to local taxation as are or may be opposite and coterminous with the constructed portion of its road; and that no such lands should be subject to taxation until after the expiration of three years from April 1st, 1871, nor until after three years from the date of the certificate showing that such lands have been earned; and providing further that the lands of the several land-grant companies opposite and coterminous with their line then in operation should be subject to taxation in two years from April 1, 1871.

Your orators state that the lands mentioned in the schedule hereto annexed, and which the defendants have listed for taxation, were not, nor were any of them, opposite to or coterminous with the line of the said Flint & Pere Marquette Railway Company, in operation in April, 1871.

XII. Your orators submit and claim that the provisions of said act of 1871 cannot be construed to include the said Flint & Pere Marquette Railway Company, nor the lands so held by your orators in trust as aforesaid, by reason of the contract created by the prior legislation as hereinbefore stated, which contract being protected by the Constitution

of the United States, cannot be set aside or annulled by State authority. Yet, if the court should be of opinion that your orators have mistaken their rights under said prior legislation, and that no contract existed which would prevent the legislature of Michigan from imposing a tax upon said granted lands, then your orators claim and insist that by the terms of the said act of 1871 a grant of an exemption from taxation is made for the time therein specified, which grant is a contract for the benefit of the said railway company, and of which your orators are entitled to avail themselves, and that the attempt to repeal the same would be ineffectual to affect your orators' rights by reason of the prohibition in the Constitution of the United States that no State shall pass any law impairing the obligation of contracts.

XIII. Your orators further state that by the constitution of Michigan, which was in force in 1856, and still continues in force, it was, and is, provided in Article XIV, that the legislature should provide a uniform rule of taxation, except on property paying specific taxes; and also that the legislature might provide for the collection of specific taxes from railroad and other corporations thereafter created; and also an appropriation of all specific State taxes, except those received from mining companies of the upper peninsula, was made for educational purposes.

Your orators further state that the said Flint & Pere Marquette Railway Company has been assessed, and has paid each year, a specific tax levied and collected under the laws of Michigan, and that the sum of $23,446.50 has been paid for the tax assessed under section 3 of art. 3 of the general railroad law of 1873, which last named sum was due and was paid on the first day of July, 1873.

That, as your orators are informed and believe, from the organization of the State until the year 1870, the property of railway companies in Michigan had never been taxed by local assessment and taxation, nor in any other manner than by specific taxes. And your orators claim and insist that, under and in accordance with the constitution of said State, the property of railway companies therein is liable to specific taxation only, and that it is not competent for the legislature of said State to change the manner and mode of taxation in respect to such property.

XIV. Your orators also state that they are advised that the title taken by the State under the land-grant act of Congress of June 3, 1856, was taken in trust for the specific purpose in said act named, and that the State was authorized to dispose of said lands only to aid in the construction of railroads for which the same were granted, and for no other purpose, and that it is in violation of the trust thus created for the State to assume to derive a revenue from said lands before the same shall have been sold by the company to which the same were granted.

6 XV. And further, that should the claim of the said defendants be conceded, and should your orators submit to the local taxation which said defendants propose to levy upon said lands, the market-price of the bonds outstanding as hereinbefore stated, and to secure which your orators hold said lands, would be depreciated, and the holders of said bonds, scattered throughout the country, would thereby be made to suffer, and would suffer great and irreparable loss.

XVI. And your orators believe that to prevent such a result it is essential that the action of said defendants should be enjoined before the cloud upon the title, which they purpose to create, as hereinbefore stated, shall accrue.

And your orators well hoped that the said defendants, acting in their

several townships as aforesaid, would have desisted and refrained from listing the lands so held by your orators as aforesaid, and from claiming the right to list the same for taxation.

But now so it is, may it please your honors, that the said Nelson Ferguson, John H. Lanphear, William Bennett, Elias C. Martin, Charles F. Derevage, and Nathaniel Clark, combining and confederating with divers other persons unknown to your orators, absolutely refuse so to do, pretending that the said lands so included in the land-grant to the Flint & Pere Marquette Railway Company as hereinbefore stated, and still held by said company unsold, subject to the said trust-deeds and mortgages to your orators, are subject to local taxation in their several townships under the laws of Michigan. Whereas your orators charge the contrary thereof to be true.

XVII. In consideration whereof, and forasmuch as your orators are remediless at and by the strict rules of the common law, and can only have relief in a court of equity; to the end, therefore, that the said Nelson Ferguson, John H. Lanphear, William Bennett, Elias C. Martin, Charles F. Derevage, and Nathaniel Clark, defendants herein, may, but without oath, their answer on oath being hereby waived, full, true, direct, and perfect answer make to all and singular the matters hereinbefore stated, as fully and particularly as if the same were here again repeated, and they thereunto distinctly interrogated; and, also, that it may be decreed:

1. That the said lands embraced in said Schedule A, hereunto annexed, are exempt from taxation for the year 1873, in the townships where the same are situated; and,

2. That the listing of said lands for taxation by the defendants, acting as supervisors in their respective townships, is unlawful and against the rights of your orators.

3. That the said defendants, and each of them, be perpetually enjoined and restrained by the decree of this court from apportioning or extending any taxes for the year 1873, for State, county, township, or other purposes, upon or against any of the lands in said Schedule A mentioned and described.

4. And that your orators may have such further and other, or other and different relief, as the nature of their case may require, and as to your honors shall seem meet;

XVIII. May it please your honors to grant to your orators the writ of injunction, to be issued out of and under the seal of said court, directed to the said Nelson Ferguson, John H. Lanphear, William Bennett, Elias C. Martin, Charles F. Derevage, and Nathaniel Clark, defendants herein, commanding them, and each of them, absolutely to desist and refrain from returning their said respective assessment-rolls to the board of supervisors of the county of Osceola, for equalization and apportionment, until they shall have erased from said rolls all the lands in said Schedule A described; and also that they, and each of them, desist and refrain from apportioning or extending any tax whatever upon their said rolls upon or against any of the lands in said Schedule A described, for the year 1873.

May it please your honors to grant unto your orators the most gracious writ of subpœna of the United States of America, to be directed to the said Nelson Ferguson, John H. Lanphear, William Bennett, Elias C. Martin, Charles F. Derevage, and Nathaniel Clark, defendants, commanding them, and each of them, under a certain penalty, to appear and answer this your orators' bill of complaint; and further to stand

to and abide by such order and decree herein as shall be agreeable to equity, and as to your honors shall seem meet.

And your orators will ever pray, &c.

CHARLES R. TUCKER,
By WM. L. WEBBER,
Attorney in Fact.
OLIVER PRESCOTT,
By WM. L. WEBBER,
Attorney in Fact.
SHEPHERD KNAPP,
By WM. L. WEBBER,
Attorney in Fact.
WM. L. WEBBER,
Solicitor for Complainants.
D. DARWIN HUGHES,
A. POND,
Of Counsel.

EASTERN DISTRICT OF MICHIGAN, *ss:*

On this 13th day of August, A. D. 1873, before me personally came William L. Webber, who signed the foregoing bill with the names of the complainants and made oath that he is the attorney in fact of said complainants, and has charge of the lands in said bill mentioned, and has a more perfect knowledge of the matters stated in said bill than any of the complainants; that said complainants do not reside in the State of Michigan, and, therefore, he verifies the said bill in their behalf. He further made oath that he has read the above bill subscribed as aforesaid and knows the contents thereof, and that the same is true of his own knowledge, except as to the defendants being acting supervisors, and except as to the listing and assessing of said land, as stated in said bill, and as to those matters he believes it to be true.

GEO. B. BROOKS, [L. S.]
U. S. Com'r for the East. Dist. of Michigan.

7 SCHEDULE A.

Subdivision of section.	Sec.	T. N.	R. W.	Acres.	100ths.	Valuation as assessed.
S. ½ of N. E. frl. ¼	5	17	7	80	.....	$480
S. E. ¼	5	17	7	160	.....	960
W. ½ of N. E. ¼	7	17	7	80	.....	320
S. E. ¼ of N. E. ¼	7	17	7	40	.....	160
E. ½ of N. W. ¼	7	17	7	80	.....	300
S. W. frl. ¼	7	17	7	129	82	600
N. ½ of N. E. ¼	9	17	7	80	.....	480
N. W. ¼	9	17	7	160	.....	960
S. ½	9	17	7	320	.....	1,920
S. ½ of S. W. ¼	21	17	7	80	.....	640
S. W. ¼ of S. E. ¼	21	17	7	40	.....	320
E. ½ of S. E. ¼	21	17	7	80	.....	640
N. E. frl. ¼ of N. W. frl. ¼	1	18	7	34	48	102
Lot No. 1	1	18	7	8	60	24
Lot No. 2	1	18	7	16	.....	48
Lot No. 3	1	18	7	18	30	55
Lot No. 5	1	18	7	20	.....	60
Lot No. 8	1	18	7	47	80	144
Lot No. 9	1	18	7	32	50	100
S. W. ¼ of S. W. ¼	3	18	7	40	.....	120
N. E. ¼ of N. E. frl. ¼	5	18	7	36	50	100
N. W. frl. ¼ of N. W. frl. ¼	5	18	7	39	50	160
S. ½ of N. W. frl. ¼	5	18	7	80	.....	320
N. E. ¼ of S. W. ¼	5	18	7	40	.....	160
S. W. ¼ of S. W. ¼	5	18	7	40	.....	160
N. W. ¼ of S. E. ¼	5	18	7	40	.....	160
N. E. ¼ of N. E. ¼	7	18	7	40	.....	160
N. W. frl. ¼ of N. W. frl. ¼	7	18	7	30	63	120
E. ½ of N. E. ¼	9	18	7	80	.....	240
E. ½ of S. E. ¼	9	18	7	80	.....	240

SCHEDULE A—Continued.

Subdivision of section.	Sec.	T. N.	R. W.	Acres.	100ths.	Valuation as assessed.
Lot No. 4	11	18	7	35	10	100
N. W. ¼ of N. W. ¼	15	18	7	40	.....	120
Lot No. 3	15	18	7	13	70	40
Lot No. 4	15	18	7	23	05	60
Lot No. 7	15	18	7	46	20	138
Lot No. 9	15	18	7	60	.....	180
Lot No. 10	15	18	7	36	60	108
Lot No. 1	19	18	7	42	70	200
Lot No. 2	19	18	7	24	60	120
Lot No. 3	19	18	7	48	20	200
Lot No. 4	19	18	7	25	50	125
Lot No. 5	19	18	7	19	20	100
Lot No. 8	19	18	7	27	.....	108
S. E. ¼ of S. W. frl. ¼	19	18	7	40	.....	150
S. ½ of S. E. frl. ¼	19	18	7	80	.....	300
Lot No. 1	21	18	7	30	.....	90
Lot No. 2	21	18	7	40	50	120
Lot No. 5	21	18	7	6	10	25
Lot No. 6	21	18	7	59	80	240
Lot No. 7	21	18	7	37	20	150
S. W. ¼ of S. W. ¼	21	18	7	40	.....	160
E. ½ of S. W. ¼	21	18	7	80	.....	320
W. ½ of S. E. ¼	21	18	7	80	.....	320
S. E. ¼ of S. E. ¼	21	18	7	40	.....	160
N. W. ¼ of N. E. ¼	27	18	7	40	.....	160
N. W. ¼	27	18	7	160	.....	640
S. W. ¼	27	18	7	160	.....	800
S. ½ of N. E. ¼	29	18	7	80	.....	400
N. W. ¼	29	18	7	160	.....	720
N. ½ of S. W. ¼	29	18	7	80	.....	400
S. E. ¼	29	18	7	160	.....	900
N. W. ¼ of N. E. ¼	31	18	7	40	.....	240
S. ½ of N. W. frl. ¼	31	18	7	70	28	420
N. E. ¼ of S. W. frl. ¼	31	18	7	40	.....	240
S. E. ¼ of S. W. frl. ¼	31	18	7	40	.....	240
N. E. ¼	33	18	7	160	.....	960
S. ½ of N. W. ¼	33	18	7	80	.....	480
E. ½ of S. W. ¼	33	18	7	80	.....	480
N. ½ of S. E. ¼	33	18	7	80	.....	480
S. E. ¼ of S. E. ¼	33	18	7	40	.....	240
S. E. ¼ of N. E. ¼	35	18	7	40	.....	200
S. ½ of S. W. ¼	35	18	7	80	.....	400
S. W. ¼ of S. E. ¼	35	18	7	40	.....	200
S. ½ of N. E. frl. ¼	1	17	8	80	.....	400 00
N. ½ of S. W. ¼	1	17	8	80	.....	400 00
S. E. ¼ of S. W. ¼	1	17	8	40	.....	200 00
S. E. ¼	1	17	8	160	.....	640 00
N. E. ¼ of S. E. ¼	11	17	8	40	.....	120 00
N. W. ¼ of N. W. ¼	13	17	8	40	.....	160 00
S. ½ of N. W. ¼	13	17	8	80	.....	320 00
S. W. ¼	13	17	8	160	.....	640 00
S. E. ¼ of S. E. ¼	13	17	8	40	.....	120 00
W. ½ of N. E. ¼	15	17	8	80	.....	320 00
E. ½ of N. W. ¼	15	17	8	80	.....	400 00
N. E. ¼ of S. W. ¼	15	17	8	40	.....	160 00
S. W. ¼ of S. W. ¼	15	17	8	40	.....	160 00
W. ½ of S. E. ¼	15	17	8	80	.....	160 00
N. E. ¼ of N. W. frl. ¼	19	17	8	40	.....	160 00
S. frl. ½ of S. W. frl. ¼	19	17	8	66	28	198 00
N. ½ of N. E. ¼	21	17	8	80	.....	320 00
S. E. ¼ of N. E. ¼	21	17	8	40	.....	160 00
S. ½ of S. W. ¼	21	17	8	80	.....	320 00
N. E. ¼ of S. E. ¼	21	17	8	40	.....	120 00
S. ½ of S. E. ¼	21	17	8	80	.....	240 00
N. E. ¼	23	17	8	160	.....	640 00
N. W ¼	23	17	8	159	.....	636 00
N. ½ of S. W. ¼	23	17	8	80	.....	280 00
S. E. ¼	23	17	8	160	.....	560 00
N. W. ¼	25	17	8	160	.....	560 00
N. ½ of S. W. ¼	25	17	8	80	.....	280 00
N. W. ¼ of S. E. ¼	25	17	8	40	.....	140 00
N. ½ of N. E. ¼	27	17	8	80	.....	280 00
S. E. ¼ of N. E. ¼	27	17	8	40	.....	140 00
N. E. ¼ of S. E. ¼	27	17	8	40	.....	200 00
N. E. ¼	29	17	8	160	.....	480 00
W. ½ of S. W. ¼	29	17	8	80	.....	280 00
Entire fractional	31	17	8	596	66	2,085 00
Entire	35	17	8	640	.....	2,240 00
Lot No. 2	25	18	8	39	30	150
Lot No. 3	25	18	8	46	70	230
N. E. ¼ of S. E. ¼	25	18	8	40	.....	200

SCHEDULE A—Continued.

Subdivision of section.	Sec.	T. N.	R. W.	Acres.	100ths.	Valuation as assessed.
S. ½ of S. E. ¼	25	18	8	80	.....	360
W. ½ of N. W. ¼	33	18	8	80	.....	400
S. ½ of S. W. ¼	33	18	8	80	.....	400
N. W. ¼ of N. E. ¼	35	18	8	40	.....	200
S. ½ of N. E. ¼	35	18	8	80	.....	400
N. E. ¼ of S. W. ¼	35	18	8	40	.....	200
S. ½ of S. W. ¼	35	18	8	80	.....	400
S. E. ¼	35	18	8	160	.....	800
S. W. ¼ of N. W. ¼	13	17	9	40	.....	300 00
S. W. ¼	13	17	9	160	.....	1,000 00
Lot No. 3	15	17	9	33	32	200 00
Lot No. 4	15	17	9	32	90	200 00
Lot No. 7	15	17	9	22	60	142 00
Lot No. 8	15	17	9	38	04	235 00
Lot No. 9	15	17	9	35	06	220 00
W. ½ of N. E. ¼	17	17	9	80	.....	600 00
N. ½ of N. W. ¼	17	17	9	80	.....	600 00
S. W. ¼ of N. W. ¼	23	17	9	40	.....	300 00
N. E. ¼ of S. W. ¼	23	17	9	40	.....	320 00
N. ½ of S. E. ¼	23	17	9	80	.....	640 00
S. E. ¼ of S. E. ¼	23	17	9	40	.....	320 00
N. ½ of N. E. ¼	25	17	9	80	.....	500 00
S. E. ¼ of N. E. ¼	25	17	9	40	.....	250 00
N. W. ¼ of N. W. ¼	25	17	9	40	.....	300 00
S. W. ¼	25	17	9	160	.....	1,200 00
N. W. ¼ of S. E. ¼	25	17	9	40	.....	300 00
S. ½ of S. E. ¼	25	17	9	80	.....	600 00
N. E. ¼	35	17	9	160	.....	1,000 00
N. ½ of N. W. ¼	35	17	9	80	.....	500 00
S. E. ¼ of N. W. ¼	35	17	9	40	.....	300 00
N. ½ of S. W. ¼	35	17	9	80	.....	400 00
S. E. ¼ of S. W. ¼	35	17	9	40	.....	200 00
N. ½ of S. E. ¼	35	17	9	80	.....	400 00
N. W. ¼ and W. ½ of S. W. ¼	13	17	10	240	.....	2,400 00

In the circuit court of the United States for the western district of Michigan.

EASTERN DISTRICT OF MICHIGAN, *ss:*

Edwin Saunders, being duly sworn, says that he has read the foregoing and annexed bill, and knows the contents thereof, and that the matters therein stated relative to the defendants being the acting supervisors of said townships, as stated, and relative to the listing and assessing of said lands for taxation, are true of his own knowledge, except as to the township of Richmond, of which he has not personal knowledge, and further says not.

EDWIN SAUNDERS.

Sworn and subscribed before me this 13th day of August, A. D. 1873.

GEO. B. BROOKS, [L. S.]
U. S. Com'r for the East. Dist. of Mich.

In the circuit court of the United States for the western district of Michigan.

EASTERN DISTRICT OF MICHIGAN, *ss:*

Alfred W. Newton, being duly sworn, says that he has read the foregoing and annexed bill, and knows the contents thereof, and that the matters contained therein as to defendant Clark being acting supervisor of the township of Richmond, and as to the listing and assessing of said land for taxation in said township of Richmond, are true of his own knowledge, and further says not.

ALFRED W. NEWTON.

Sworn and subscribed before me this 13th day of August, A. D. 1873.

GEO. B. BROOKS, [L. S.]
U. S. Com'r for the East. Dist. of Michigan.

8 Afterwards, on the 21st day of August, A. D. 1873, the appearance of said defendants was entered and filed as follows:

In the circuit court of the United States for the western district of Michigan. In equity.

CHARLES R. TUCKER, OLIVER PRESCOTT, SHEPherd Knapp, complts,
vs.
NELSON FERGUSON, JOHN H. LAMPHEIR, William Bennett, Elias C. Martin, Charles F. Derevage, Nathaniel Clark, defts.

To the register of said court:

Please enter the appearance of the said defendants, Nelson Ferguson, John H. Lampheir, William Bennett, Elias C. Martin, Charles F. Derevage, and Nathaniel Clark, by Byron D. Ball, atty. genl., as their solicitor, and C. A. Kent, Alfred Russell, Charles Upson, and E. W. Meddaugh, of counsel.

Yours, &c.,

BYRON D. BALL,
Atty. Genl., Solr. for Defendants.

C. A. Kent, Alfred Russell, Charles Upson, E. W. Meddaugh, of counsel. Detroit. August 20, 1873.

9 Whereupon an order was entered in the chancery order-book of said court, as follows:

CHARLES R. TUCKER, OLIVER PRESCOTT, & SHEPherd Knapp,
v.
NELSON FERGUSON, JOHN H. LAMPHEIR, William Bennett, Elias C. Martin, Charles F. Derevage, & Nathaniel Clark.

In this cause, on motion of Byron D. Ball, solicitor for defendants, ordered that the appearance of the said defendants be, and the same is hereby, entered, and that the said complainants serve a copy of the bill of complaint on the defendants' solicitors within twenty days after notice of this order, or said bill will be dismissed.

Dated Aug. 21, 1873.

BYRON D. BALL,
Atty. Genl., & Solr. for Defts.

Afterwards, on the 18th day of November, A. D. 1873, a demurrer was filed, which is as follows:

10 In the circuit court of the United States for the western district of Michigan.

CHARLES R. TUCKER, OLIVER PRESCOTT, SHEPhard Knapp, complainants,
v.
NELSON FERGUSON, JOHN H. LAMPHEIR, William Bennett, Elias C. Martin, Charles F. Derevage, Nathaniel Clark, defendants.

These defendants, by protestation, not confessing or acknowledging all or any of the matters and things in the said complainants' bill to be

true in such manner and form as the same are therein set forth and alleged, do demur thereto, and for cause of demurrer show that the said complainants have not, in and by their said bill, made or stated such a case as doth or ought to entitle them to any such discovery or relief as is thereby sought and prayed therefor from or against these defendants. Whereupon the defendants demand the judgment of this honorable court whether they shall be compelled to make any further or other answer to the said bill of complaint, or any of the matters and
11 things therein contained, and pray to be hence dismissed with their reasonable costs in this behalf sustained.

BYRON D. BALL,
Attorney-General of Michigan, Solicitor for the Defendants.

The undersigned, counsellors at law of said court, hereby certify that in our opinion the above demurrer is well founded in point of law.

ALFRED RUSSELL,
C. A. KENT,
Counsel for Defendants.

I hereby waive the affidavit of defendants that the demurrer is not interposed for delay.

WM. L. WEBBER,
Solr. for Comp.

12 At a session of the circuit court of the United States for the western district of Michigan, held at the city of Grand Rapids, on the 29th day of November, in the year of our Lord one thousand eight hundred and seventy-three, and of the Independence of the United States of America the ninety-eighth.

Present, the honorable Solomon L. Withy, district judge:

Among the proceedings then and there had were the following, to wit:

Decree in chancery.

CHARLES R. TUCKER, OLIVER PRESCOTT, & Shephard Knapp, complainants,
vs.
NELSON FERGUSON, JOHN H. LAMPHIER, William Bennett, Elias C. Martin, Charles F. Derevage, Nathaniel Clark. } No. 245.

The above-entitled cause came on to be heard upon the bill of complaint filed therein, and the demurrer filed thereto, and, after hearing D. Darwin Hughes, of counsel for the complainants, and Byron
13 D. Ball, attorney-general of the State of Michigan, and Charles A. Kent, of counsel for the defendant', and after due consideration and deliberation had thereupon, it it is ordered, adjudged, and decreed, and the said court by virtue of its authority doth order, adjudge, and decree, that the said demurrer to the said bill of complaint in this cause be, and the same is hereby, sustained; and it is further by the said court ordered, adjudged, and decreed that the said bill of complaint be, and the same is hereby, dismissed, out of this court, with costs to the defendants; that the said defendants recover their costs aforesaid, to be taxed, and that they have execution therefor.

S. L. WITHY.

Afterwards, on the 17th day of December, A. D. 1873, the said complainants presented and filed their petition for appear, which, together with the allowance thereof by his hon. S. L. Withy, U. S. dist. judge, endorsed thereon, is hereto attached; also the bond upon such appeal

14 The circuit court of the United States for the sixth circuit and western district of Michigan, in equity.

CHARLES R. TUCKER, OLIVER PRESCOTT, AND Shepherd Knapp, complainants,
vs.
NELSON FERGUSON, JOHN H. LAMPHIER, William Bennett, Elias C. Martin, Charles F. Derevage, and Nathaniel Clark, defendants.

To the honorable the Supreme Court of the United States:

The appeal of Charles R. Tucker, Oliver Prescott, and Shepherd Knapp, the before-named complainants and appellants, respectfully showeth that on the twentieth day of August, A. D. 1873, the before-named complainants filed their bill in the circuit court of the United States for the western district of Michigan against the before-named defendants and appellees, stating and setting forth therein that by certain acts of Congress certain lands described in a schedule annexed to said bill were granted to the State of Michigan to aid in the construction of a railway in this State, known as the Flint and Pere Marquette Railroad,
15 and setting forth that by certain acts of the legislature of the State of Michigan said lands and the trust upon which they were granted to the State of Michigan were conveyed to a corporation created by the legislature of the State of Michigan, under the name of the Flint and Pere Marquette Railway Company; and also setting forth that the said Flint and Pere Marquette Railway Company, to enable it to raise money for the purpose of constructing its said railroad, did, by mortgage, convey to said complainants and appellants the lands described in the schedule annexed to said bill, among other lands, being the same lands granted by Congress to aid in the construction of said road, which said lands described in said schedule annexed to said bill are situated in the county of Osceola, and in the following townships, to wit: the township of Orient, the township of Sylvan, the township of Evart, the township of Osceola, the township of Hersey, and the township of Richmond; and that the said defendants were acting as supervisors of said townships, and, as such supervisors, had made out their assessment-rolls, and listed therein the lands for their townships, for assessment upon which to apportion and extend the taxes to be levied in said townships for State, county, and township purposes for the year eighteen hundred and seventy-three, and that they embraced in said rolls the said lands of complainants, claiming them to be subject
16 and liable to taxation under the laws of the State of Michigan, and setting forth further in said bill that the complainants held said lands under said mortgages free and exempt from local taxation, by force of said acts of Congress, and by virtue of contracts with the State of Michigan, and in and by which said bill said complainants prayed that it might be decreed that said lands were exempt from taxation for the year one thousand eight hundred and seventy-three, in the townships where the same were situated, and that the listing of said lands by the defendants is unlawful, and against the rights of the complainants, and that the defendants, and each of them, might be perpetually enjoined

and restrained from apportioning and extending any taxes for the year one thousand eight hundred and seventy-three, for State, county, township, or other purposes, upon or against any lands in said schedule annexed to said bill mentioned and described, and that the complainants might have such further and other relief as the nature of their case might require, and that on the fifteenth day of November, A. D. 1873, a general demurrer was filed by all of the defendants to said bill of complaint, and that on the twenty-ninth day of November, A. D. 1873 a final decree was made and pronounced in the cause, dismissing said bill for want of equity, on the merits. Wherefore these appellants appeal from the whole of said decree of said circuit court of the United States,
17 and respectfully pray that the decree of said circuit court and the bill, pleadings, and proceedings in the said cause may be sent to the Supreme Court of the United States, without delay, and that the said Supreme Court will proceed to hear the said cause anew, and that the decree of said circuit court, and every part thereof, may be reversed, and such other decree made therein as to the said Supreme Court shall seem just, with costs to the appellants.

Dated this first day of December, A. D. 1873.

CHARLES R. TUCKER,
OLIVER PRESCOTT, &
SHEPHERD KNAPP,
Complainants,
By WM. L. WEBBER,
Their Soli. & Atty. in fact.

Appeal allowed December 17, 1873.

S. L. WITHEY,
U. S. Dist. Judge.

(Indorsed:) Filed Dec. 17, 1873. Isaac H. Parrish, clerk.

18 Supreme Court of the United States. In equity.

CHARLES R. TUCKER, OLIVER PRESCOTT, AND Shepherd Knapp, complainants,
vs.
NELSON FERGUSON, JOHN H. LAMPHIER, William Bennett, Elias C. Martin, Charles F. Derevage, and Nathaniel Clark, defendants.

Know all men by these presents, that we, Charles R. Tucker, Oliver Prescott, and Shepherd Knapp, as principals, and Henry C. Potter and Wm. L. Webber, of East Saginaw, Michigan, as sureties, are held and firmly bound unto Nelson Ferguson, John H. Lamphier, William Bennett, Elias C. Martin, Charles F. Derevage, and Nathaniel Clark, of the county of Osceola, in the State of Michigan, in the sum of five hundred dollars, to be paid to the said Nelson Ferguson, John H. Lamphier, William Bennett, Elias C. Martin, Charles F. Derevage, and Nathaniel Clark, their executors or administrators; to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly
19 by these presents, sealed with our seals, dated this first day of December, 1873.

Whereas the above-named Charles R. Tucker, Oliver Prescott, and Shepherd Knapp have taken an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled ac-

tion by the circuit court of the United States for the sixth circuit and western district of Michigan, in equity—

Now, therefore, the condition of this obligation is such that, if the above-named Charles R. Tucker, Oliver Prescott, and Shepherd Knapp shall prosecute their said appeal to effect, and answer all costs if they shall fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and virtue.

CHARLES R. TUCKER, [L. S.]
By WM. L. WEBBER, *Atty. in fact.*
OLIVER PRESCOTT, [L. S.]
By WM. L. WEBBER, *Atty. in fact.*
SHEPHERD KNAPP, [L. S.]
By WM. L. WEBBER, *Atty. in fact.*
HENRY C. POTTER. [L. S.]
WM. L. WEBBER. [L. S.]

Sealed and delivered in presence of—
ALFRED W. NEWTON.
JOHN J. RUPP.

Approved as to form of bond & sufficiency of security, Dec. 17, 1873.
S. L. WITHEY,
U. S. Dist. Judge.

(Indorsed:) Filed Dec. 17th, 1873. Isaac H. Parrish, clerk.

20 By the honorable Solomon L. Withey, one of the judges of the circuit court of the United States for the western district of Michigan.

To Nelson Ferguson, John H. Lamphier, William Bennett, Elias C. Martin, Charles F. Derevage, and Nathaniel Clark:

Whereas Charles R. Tucker, Oliver Prescott, and Shepherd Knapp have lately appealed to the Supreme Court of the United States from a decree lately rendered in the circuit court of the United States for the western district of Michigan, made in favor of you, the said Nelson Ferguson, John H. Lamphier, William Bennett, Elias C. Martin, Charles F. Derevage, and Nathaniel Clark, and have filed the security required by law, you are therefore hereby cited to appear before the said Supreme Court, at the city of Washington, on the second Monday of October next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand, at the city of Grand Rapids, in the western district of Michigan, in the sixth circuit, the 17th day of December, in the year of our Lord one thousand eight hundred and seventy-three.

S. L. WITHEY,
U. S. Dist. Judge.

21 STATE OF MICHIGAN,
County of Saginaw, ss:

George K. Newcombe, of said county, being duly sworn, deposes and says that on the twenty-third day of December, 1873, he served the within citation on Byron D. Ball, attorney-general of the State of Michigan, and solicitor of record for the defendants in the cause in said citation mentioned, in the circuit court of the United States for the western district of Michigan, by exhibiting to him the original citation and delivering to him a copy of the same, at the city of Lansing, in the State of Michigan.

GEO. K. NEWCOMBE.

Subscribed and sworn to before me this 24th day of December, 1873.

ALFRED W. NEWTON,
Notary Public in and for Saginaw County, Michigan.

I hereby acknowledge due personal service of the within citation upon me this 23d day of December, 1873.

BYRON D. BALL,
Attorney-General.

22 UNITED STATES OF AMERICA:
Western District of Michigan, ss:

I, Isaac H. Parrish, clerk of the circuit court of the United States for the sixth judicial circuit and western district of Michigan, do hereby certify that the writings annexed to this certificate are true copies of their respective originals, on file and remaining of record in my office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of Grand Rapids, in said district, this 18th day of December, A. D. 1873.

[SEAL.] ISAAC H. PARRISH, *Clerk.*

Fees for copy, $10.

(Indorsement on cover:) No. 364. Charles R. Tucker, Oliver Prescott, and Shepherd Knapp, appellants, vs. Nelson Ferguson, John H. Lamphier, William Bennett, Elias C. Martin, Charles F. Derevage, and Nathaniel Clark. W. Michigan. C. C. U. S. Filed 12th January, 1874.

REC. 364—2

Supreme Court of the United States.

No. 364.

CHARLES R. TUCKER, OLIVER PRESCOTT, AND SHEPHERD KNAPP,

Appellants.

vs.

NELSON FERGUSON, JOHN H. LANPHIER, WILLIAM BENNET, ELIAS C. MARTIN, CHARLES F. DEREVAGE, AND NATHANIEL CLARKE,

Defendants.

BRIEF FOR APPELLANTS.

J. S. BLACK,
TITIAN J. COFFEY,
Of Counsel for Appellants.

M'GILL & WITHEROW, PRINTERS, WASHINGTON, D. C.

Supreme Court of the United States.

CHARLES R. TUCKER, OLIVER PRESCOTT and SHEPHERD KNAPP, Appellants,

vs.

NELSON FERGUSON, JOHN H. LANPHIER, WILLIAM BENNET, ELIAS C. MARTIN, CHARLES F. DEREVAGE and NATHANIEL CLARK, Defendants.

No. 364.

STATEMENT OF THE CASE.

The above named appellants, the first two, citizens of Massachusetts, and the third, a citizen of New York, trustees, as hereinafter stated, filed a bill in the United States circuit court for the western district of Michigan, on the 20th August, 1873, against the above named defendants, who were supervisors, respectively, of certain townships in Osceola county, Michigan, to restrain them by injunction from assessing and returning for State, county, township, and other taxation, certain lands in Osceola county which had been conveyed to the said complainants by the Flint and Pere Marquette Railway Company, in trust, to secure the holders of bonds issued and sold for the benefit of that company.

The bill alleges the following facts:

By act of June 3, 1856, Congress granted to the State of Michigan alternate sections of the unsold public lands, within certain limits, to aid in the construction of railroads on certain routes therein named, one of which was from Pere Marquette to Flint, on conditions expressed in the act, among which was that the State should dispose of the lands for the purpose named, and no other.

Early in 1857 the Flint and Pere Marquette Company was organized, under the general railroad law of Feb. 12, 1855, to construct a railroad from Flint to Pere Marquette, on Lake Michigan, a distance of about 170 miles.

By act of Feb. 14, 1857, (after the company was organized,) Michigan accepted the grant, and disposed of it as directed by Congress, *inter alia*, disposing of and granting to the Flint and Pere Marquette Company the designated lands, franchises, &c., to aid in the construction of their road between the points named.

This act re-enacted the conditions of the act of Congress and added others; stipulating that the lands should be exclusively applied to the construction of the railroads, and to no other purpose whatsoever; that the railway companies, by a majority vote of the directors, should accept the lands, &c., and agree to the requirements of the act, by writing filed with the Secretary of State; locate the line of road, make and file maps thereof, and do other things in the act more fully specified.

By section 20, the act also, in consideration of the grant of lands, &c., required the companies to pay the State a a specific annual tax on the cost of the road, &c., and reserved the right to impose, after ten years, a further tax on gross receipts, which were to be in lieu of all other taxes to be imposed within the State.

The Fint and Pere Marquette Railway Company accepted its grant on the terms stipulated, and proceeded to construct its road. It constructed in accordance with law, as follows:

In September, 1860	20 miles.
In January, 1863	$13\frac{7}{10}$ "
In January, 1868	20 "
In December, 1868	$6\frac{55}{100}$ "
In December, 1871	40 "
In all, up to December, 1871	$120\frac{25}{100}$ "

Further time having been granted by Congress to com-

plete the road, the period for completion will not expire until March 3, 1876. The road was not completed at the time the bill was filed, there being at that time about 48 miles to be constructed, viz, from Reed City, westwardly, to Pere Marquette, its western terminus—nor is it yet completed.

Lists of the lands granted to the company were made at the national land office, and are embraced in schedule "A." (Rec., p. 9.) These include the lands in Osceola county, which the defendants are asked in the bill to be restrained from assessing for taxation. Of these lands in that county the lists embraced about $28{,}598\frac{69}{100}$ acres, of which the complainants have sold about $17{,}705\frac{72}{100}$ acres, leaving unsold, $10{,}892\frac{97}{100}$ acres, which the defendants claim the right to assess.

None of the lands thus claimed to be subject to assessment for taxation were opposite to, or coterminous with, the line of the Flint and Pere Marquette Railroad, in operation in April, 1871.

The company, to raise money to construct its road, on the 25th of September, 1866, executed a mortgage and trust deed to the complainants, as trustees, conveying 153,600 acres of their lands, part of the grant, as security for bonds issued and sold to the amount of $500,000.

On the 4th of September, 1868, the company executed another mortgage and trust deed to complainants, as trustees, conveying all the residue of the lands embraced in the grant, to secure additional bonds issued and sold to the amount of $2,500,000.

These mortgages and trust deeds conveyed the lands with other property to the complainants, on certain trusts to secure the payment of the bonds. They contained each a power of sale of the lands conveyed, and terms and conditions for the management of the trust, and the sale of the lands and the application of the proceeds of their sale to the payment of the bonds.

The complainants accepted the trusts and entered on their execution. There had been sold, on the 1st of Janu-

ary, 1873, of the bonds secured by the mortgage of 1866, the sum of $146,000, and of the bonds secured by the mortgage of 1868, the sum of $2,224,000. The moneys received therefrom were expended by the company exclusively in the construction and equipment of its railroad. These bonds are outstanding in unknown hands, except such of them as have been taken up and canceled from the proceeds of the mortgaged lands sold for that purpose under the power of sale in the mortgages.

The mortgaged lands include the lands in schedule "A," located in the several townships of Osceola county, of which the defendants are, respectively, supervisors, which lands they claim the right, as such supervisors, to assess and list for taxation in their respective townships for the year 1873, under the laws of Michigan.

The complainants assert:

1st. That the State, under the act of Congress, accepted the lands *in trust* to dispose of them exclusively to aid in the construction of the named railroads; that that trust is not yet executed, and, until executed, the State cannot tax the lands.

2d. That the legislation of the State in execution of the trust, and the acceptance by the companies of the lands, on the terms stipulated, and their construction of the roads in accordance therewith, created an irrevocable contract on the part of the State that the lands, whilst unsold, should be free from local taxation, the obligation of which cannot be impaired without violating the Constitution of the United States.

3d. That section 37 of the act of April 18, 1871, having exempted from local taxation granted lands not opposite to, and coterminous with, the constructed portions of railroads, until three years from April 1, 1871; and none of the said lands listed for taxation having been opposite to, and coterminous with, the line of the Flint and Pere Marquette Company, in operation in 1871, such lands were protected from taxation in 1873, by that act.

4th. That, under the constitution of Michigan, only spe-

cific taxes can be imposed on railway property; that until 1870, no local, or other than specific, taxes had ever been imposed on such property, and that the Flint and Pere Marquette Company had paid to the State a specific tax each year, and, on the 1st of July, 1873, had paid $23,446 50 specific taxes assessed under the act of 1873.

The complainants assert that local taxation would cloud the title to the lands, depreciate greatly the market value of the bonds, causing the holders thereof irreparable loss, &c., and, to prevent that result, they ask that each of the defendants be enjoined, &c.

The defendants, 18th November, 1873, demurred to the bill (Record, p. 12), which demurrer, the circuit court, 29th November, 1873, sustained, and thereupon dismissed the bill. (Record, p. 13.)

From this decree, complainants, 17th December, 1873, appealed to this court.

Errors Assigned.

The court erred in refusing to issue the injunction prayed for, and in dismissing the bill, which errors are alleged for the following reasons:

1st. That the interest of the United States in the lands was not so completely extinguished as that they were subject to State taxation in 1873, and will not be so extinguished until the State has finally executed the trust created by the act of June 3, 1856, by the application of the proceeds of the sales of the lands to the cost of constructing the railroads.

2d. That in executing this trust, the State retained, and, as to roads uncompleted or unpaid for, still retains an interest in, and supervision over, the unsold lands, which cannot be relinquished until the trust is finally executed as aforesaid; and this interest and supervision is inconsistent with the right to tax them until after they are sold.

3d. That the national and State legislation granting the

lands to, and the acceptance of them by, the railway companies, on the stipulated terms, and their compliance with those terms, created a contract between the State and the companies that the lands should be applied exclusively and without diminution to the construction of the railroads, which is impaired by taxation before they have been sold and their proceeds so applied.

4th. That section 20 of the State act of February 14, 1857, contained a contract that no taxes should be assessed on the railway companies except specific taxes, and the taxation of these lands, under the acts of 1873, is a breach of that contract.

5th. That the State of Michigan has no reserved power to impair this contract to the prejudice of the railway companies or their creditors.

6th. That section 37 of the act of April 18, 1871, contained a grant to the land grant companies, that the said lands opposite to, and coterminous with, the constructed portions of their roads, should not be subject to local taxation until three years from April 1, 1871, and the taxation of the lands in Osceola county, in question, in 1873, is an impairment of that grant, and illegal.

7th. That the constitution of Michigan prohibits the imposition of any taxes on railway corporations except specific taxes.

The questions thus presented, require, for their intelligent consideration, a fuller statement of the legislation, national and State, than the bill contains.

Acts of Congress.

Act of June 3, 1856, (p. 1.)*

The act of June 3, 1856, (11 Stats., 21,) section 1, "granted to the State of Michigan, to aid in the construction" of

* This reference is to the pages of the "Appendix of Federal and State Legislation," filed with the brief.

certain proposed "railroads," *inter alia* "from Grand Haven and Pere Marquette to Flint, and thence to Port Huron, every alternate section of land designated by odd numbers for six sections in width on each side of said roads, * * * which lands shall be held by the State of Michigan for the use and purpose aforesaid; * * the lands to be so located shall in no case be further than fifteen miles from the lines of said roads, and selected for, and on account of, each of said roads; * * that the lands hereby granted shall be exclusively applied in the construction of that road, for and on account of which such lands are hereby granted, and shall be disposed of only as the work progresses, and the same shall be applied to no other purpose whatsoever."

Section 2 enacted that the sections, or parts thereof, which, by such grant, should remain to the United States within six miles on each side of each of said roads, should not be sold for less than double the minimum price of the public lands when sold, nor should they be subject to private entry until first offered at public sale at the increased price.

SEC. 3. That the lands thereby granted to the State should "be subject to the disposal of the Legislature thereof, for the purposes aforesaid, and no other, and the said railroads shall be and remain public highways for the use of the Government of the United States, free from toll or other charges upon the transportation of any property or troops of the United States."

SEC. 4. That the lands hereby granted to said State shall be *disposed of by said State only*, in manner following, that is to say: That a quantity of land not exceeding 120 sections for each of said roads, and included within a continuous length of twenty miles of each of said roads, may be sold; and when the Governor of said State shall certify to the Secretary of the Interior that any twenty continuous miles of any of said roads is completed, then another quantity of land hereby granted, not to exceed 120 sections for each of said roads having twenty continuous miles completed as aforesaid, and included within a continuous length of twenty miles of each of such roads, may be sold; and so,

from time to time, until said roads are completed; and if any of said roads is not completed within ten years, no further sales shall be made, and the lands unsold shall revert to the United States.

SEC. 5. That the United States mail shall be transported over said roads, under the direction of the Post Office Department, at such price as Congress may, by law, direct.

Resolution of February 17, 1865, (*p.* 2.)

Congress, by resolution of February 17, 1865, (13 Stats., 569,) extended the time for the reversion to the United States of the lands granted by the foregoing act, to aid in the construction of a railroad from Pere Marquette to Flint, and for the completion of said road, for five years, *i. e.*, until February 17, 1870.

Act of March 3, 1871, (*p.* 3.)

Again, by act of March 3, 1871, (16 Stats., 582,) Congress extended the time for the reversion to the United States of the lands granted to aid in the construction of a railroad from Pere Marquette to Flint, and for the completion of said road, for a further period of five years, to wit, until March 3, 1876.

Sec. 2 provided that the State of Michigan might authorize the sale of sixty sections of the land granted to aid the construction of said railroad from Pere Marquette to Flint, whenever the Governor of the State should certify that ten additional miles of railroad is completed and in running order as a first-class railroad.

LEGISLATION OF MICHIGAN.

Act of February 14, 1857, (*p.* 4.)

By act of February 14, 1857, it was enacted:

SEC. 1. That the lands, franchises, rights, powers and privileges granted to, and conferred upon, the State of Michigan by an act of Congress, &c., approved June 3, 1856,

be, and the same are hereby, accepted, with the restrictions and upon the terms and conditions contained in said act of Congress.

SEC. 2. "So much of the aforesaid lands, franchises, rights, powers, and privileges as are or may be granted and conferred in pursuance of said act of Congress, to aid in the construction of a railroad," *inter alia*, "from Pere Marquette to Flint, and thence to Port Huron, are hereby vested fully and completely in the Flint and Pere Marquette Railway Company, according to the provisions of the act of Congress relating thereto, and the direction of the board of control hereby appointed. * * * All and each of the several railroad companies mentioned in this section shall be subject to all the conditions, restrictions, and obligations imposed upon them by this act, as hereinafter provided."

SEC. 3. The lands, franchises, &c., conferred on the railroads, to be *exclusively* applied in the construction of their respective lines of road, and to no other purposes whatsoever.

Sec. 4 embodies the provisions of the 3d and 5th sections of the foregoing act of Congress, as to said roads being highways, and as to the transportation of the mails.

SEC. 5. The railroad companies required, by a vote of majority of directors, to accept the lands, franchises &c., such acceptance to be embodied in written instrument, duly signed and attested, in which they shall "assent and agree to the provisions and requirements of this act," and which shall be filed in office of Secretary of State within 60 days.

Sec. 6 requires railroad companies, by the next December, to locate line of railroad, make and file copies of maps of line in office of Governor and Secretary of State of Michigan, and the Governor to file duplicate of maps in proper office at Washington.

Sec. 7 declares that, after completion of 20 miles of road, said companies may sell 60 sections of land in any twenty continuous miles of line of road, &c.; "*and after the full and*

final completion of the entire length of its road, and the acceptance of the same by the board of control herein provided, then the company may sell the remainder of the lands, &c., and not before;" and none of the lands to be liable to taxation for seven years from 1st September next, except such parts as shall be sold or be improved.

SEC. 8. To secure the construction of the railroads in time and manner prescribed, "and for the purpose of properly managing and disposing of the lands appropriated to aid in the construction thereof," six commissioners are created, with the Governor as *ex officio* president, who are constituted a board of control, "*whose duty it shall be to manage and dispose of such lands in aid of the construction of the aforesaid railroads*, in the manner in this act provided, &c., and who were to be paid by the companies."

Sec. 11. Board of control, in certain contingencies, may declare said lands forfeited to the State, and they are then required to confer them on other parties.

SEC. 12. Railroad companies, at all times and in all matters, to be *subject to laws of the State*, "*and to such rules and regulations as may from time to time be enacted by the Legislature of Michigan, in regard to the management and disposition of the said lands, not inconsistent with the provisions of this act and the act of congress making said grant of land to this State*, and they shall be entitled to all the *immunities and privileges* conferred by said laws; *Provided*, That nothing herein contained shall be so construed as to relinquish the right of the State to any specific tax imposed upon any railroad company within this State."

SEC. 16. The railroad companies to take said grants of lands with the conditions imposed and incumbrances specified in this act, and to have no claim or recourse upon the State for a misapplication of the grants.

SEC. 19. The companies to complete and put in running order at least 20 continuous miles during each year after 1st December next, 1857, and to complete entire length of road within *seven* years from 15th November next, 1857.

[These periods for completion extended by act of 3 Feb., 1858, and act 12 Feb., 1861.]

SEC. 20. In consideration of the grants of land and other privileges hereby conferred on each of the several railroad companies mentioned and named in section two of this act, the said several railroad companies are hereby required, within sixty days from and after the first day of each and every year, to pay into the treasury of this State, as a specific annual tax, one per cent. upon the cost of the road and its equipments and appurtenances, of whatever kind; and it shall be lawful for the legislature of this State, in their discretion, after ten years, to impose upon either or each of said railroad companies the payment of a further tax upon the gross or total earnings of such road of not exceeding two per cent.; which said above several taxes shall be in lieu of all other taxes to be imposed within this State: *Provided*, That the provisions of this section shall not apply to railroad companies in the upper peninsula of this State until after ten years from the passage of this act: *Provided, also*, That the aforesaid additional tax of two per cent. shall be imposed upon the Detroit and Milwaukie Railway Company, and the Port Huron and Milwaukie Railway Company, only in proportion to the amount of land which they shall respectively receive in comparison with the quantity of lands received by the other railroad companies; which proportion shall be settled by the board of control.

[By sec. 2 of act of 14 Feb., 1859, (p. 11,) amending the act of 14 Feb., 1857, these railroad companies are made subject to the same rate of taxation only, and in same manner as provided in sec. 45 of general railroad law of Feb. 12, 1855. (p. 20.) This did not alter the method of specific taxation, but imposed an annual tax of one per cent. on "the capital stock *paid in*, in lieu of all other taxes—a manifest benefit to the land grant companies. By act of 15 Feb., 1859, (p. 11,) the Legislature repealed the foregoing 20th section of act of 14 Feb., 1857, having, by the act just cited, substituted the lighter specific tax of the general law of 12 Feb., 1859.]

Act of March 19, 1863, (*pp.* 13, 14.)

By act of 19 March, 1863, the railroad companies who had finished 20 miles of their roads were given additional time to finish all their roads, and were declared "entitled

to take and sell the lands donated for the use of the said roads respectively by said act of Congress, at such times, &c., as are in said act mentioned."

Act of 21 *March*, 1865, (*p.* 14.)

By act of 21 March, 1865, sec. 1, the Flint and Pere Marquette Railway Company is required to construct and complete its road from Flint to Pere Marquette within five years from the 1st day of June, 1866, and it "shall have the rights and privileges, and may dispose of the lands granted to aid in the construction of its road, and shall construct the whole line of its road *under and subject to the restrictions, conditions, and regulations prescribed by the act of Congress donating said lands*, the resolution of Congress relating thereto, approved Feb. 17, 1865, and *in and by the said act of the Legislature of this State of Feb.* 14, 1857, *and the acts amendatory thereof.*"

To prevent the threatened reversion to the United States of the lands donated to the Flint and Pere Marquette Company, by their failure to complete their line under the terms of the act of Congress of 3 June, 1856, the Legislature passed a joint resolution, 16 February, 1871, (p. 15,) requesting their representatives to urge the passage by Congress of the bill to extend the time for the completion of that railroad, which bill was enacted into a law March 3, 1871, above cited.

General Railroad Legislation.

The general railroad law of 12 Feb., 1855, (p. 17,) under which, as we have seen, the Flint and Pere Marquette Railway Company was organized, was succeeded by the general railroad law of 18 April, 1871, (p. 21.) The 2d section of the act of 14 Feb., 1859, (*supra*,) having substituted, as to the land grant companies, the method of specific taxation provided in the 45th section of the general law of 12 February, 1855, in place of the specific tax imposed by the 20th section of the act of 14 Feb., 1857, (*supra*,) the act of

18 April, 1871, in turn, by sec. 37, (p. 23,) subjected railway companies to an annual tax on their gross receipts.

But in the same section (37) of the act of 18th April, 1871, which imposed a specific tax on gross receipts, (which was therein declared to be in lieu of all other taxes upon the property of railway companies, whether real, personal, or mixed,) an exception was made of "real property not necessary for carrying on the ordinary operations or franchises of their road." And it was declared that "only such lands granted to any railroad company shall be liable to local taxation as are or may be opposite to, and coterminous with, the constructed portion and portions of said roads," respectively: *And provided further, That no such lands shall be subject to taxation until after the expiration of three years from and after the 1st day of April, 1871, and until after three years from the date of the certificate, showing that such lands have been earned by said railroad company, after which time, said lands shall be taxed as other lands, except as hereinafter provided. And provided further,* That the lands of the several land grant companies opposite and coterminous with their lines, as now in operation, shall be subject to taxation in two years from said 1st day of April, 1871. (See act 18th April, 1871, sec. 37, p. 23.)

Although, by sec. 50, it is declared that this act of 1871 may be altered, amended, or repealed, yet such alteration, amendment, or repeal "*shall not affect the rights of property of companies organized under it.*" And although its provisions (sec. 50) are declared to apply to companies incorporated under the act of February 12, 1855, yet, in section 55, it is expressly declared that "all *rights* and liabilities *existing*, acquired, or incurred *at the time this act takes effect, are hereby saved.*"

This act of 1871 nowhere assumes to repeal, in terms, the contract provisions of the land grant act of 14th February, 1857, and all rights secured to the railway companies in respect to the lands granted them by that act, under the act of Congress of 1856, are thus, in express terms, saved to them by the clause just cited.

Act of April 19, 1873, (*p.* 3.)

The next act which provided for the taxation of railroad lands, was that of April 19, 1873, p. 31.

SEC. 1. That all lands known as railroad lands, situated in this State, which may have been heretofore earned or obtained by any person, company, or corporation, by or for the construction of any railroad in this State, shall be assessed and taxed in the same manner that all other lands are assessed and taxed.

Act of May 1, 1873, (*p.* 25.)

Finally, the general railroad law of 1st May, 1873, (p. 25,) repealing and supplying the general law of 12th February 1855, and its supplements, and also the general law of 18th April, 1871, and its supplements, and repealing also all acts or parts of acts "contravening any of its provisions," was passed.

Section 3 of Article III (p. 28) supersedes and supplies the 37th section of the act of 18th April, 1871, as follows:

SEC. 3. Every company formed under the provisions of this act shall, on or before the first day of July in each year, pay to the State treasurer, on the statement of the auditor general, an annual tax upon the gross receipts of said company, computed in the following manner, viz: Upon all gross receipts not exceeding four thousand dollars in amount per mile of road actually and regularly operated for the conveyance of passengers and freight, two per cent. of such gross earnings; upon such gross receipts in excess of four thousand dollars per mile so operated, three per cent. thereof; *which amount or tax shall be in lieu of all other taxes upon the property or such companies, except such real estate as is owned and can be conveyed by such corporation under the laws of this State, and not actually occupied in the exercise of its franchises, and not necessary or in use in the proper operation of its road; but such real estate so excepted shall be liable to taxation in the same manner, for the same purposes, and to the same extent, and subject to the same conditions and limitations as to assessment for taxation, to taxation, and to the collection and return of taxes thereon, as is other real estate in the several townships within which the same may be situated.*

Section 13 of Article V, after repealing the acts above named and their supplements, declares:

But the organization of all corporations, under the provisions of either of said acts, shall be deemed and taken to be organizations under this act, *and all rights, obligations, and liabilities contracted or incurred by any of such corporations thereunder, or under the provisions of any law now in force, not inconsistent with the provisions of this act, shall continue of the same force and effect as though such acts or law had not been repealed;* and all such companies, from and after the taking effect of this act, shall be subject to all the provisions hereof as fully as though such organization had been perfected hereunder.

ARGUMENT.

Interest in United States as Grantor, and in State as Trustee, until the Trust is executed.

Points I and II.

It will be convenient to consider together the propositions embraced in the first and second points, viz:

That these lands had not so completely passed from the ownership of the United States as to have fallen within the taxing power of the State, but were granted to, and held by, the State, in special trust, to effectuate the purpose of the act of June 3, 1856, viz, to aid in the construction of certain railroads, a work beneficial to the nation as well as to the State, and they cannot pass completely from the national ownership until that trust is entirely fulfilled by the State:

That, in executing that trust, the State retained, and as to roads yet uncompleted or unpaid for, (of which the Flint and Pere Marquette railroad is one,) still retains, an interest in, and supervision and control over, the lands yet unsold, which, being essential to the execution of the trust, cannot be relinquished until the trust is entirely fulfilled:

That, as to the lands in question, the trust will not be entirely fulfilled until the railroad is constructed, the lands sold, and their proceeds exclusively applied to the cost of such construction, through the process of mortgage and sale by the complainants, under the mortgage and trust deeds of 1866 and 1868; and

That the trust, not having been thus completely executed, the taxation of the lands in question, under the acts of 1873, before their sale by the process aforesaid, is illegal and void, both as against the unextinguished rights and interests of the United States and as in violation of the State's duties and obligations to the trust.

I. Relation of the United States to the Trust.

1. It will be admitted that the State cannot tax the national domain, or restrain or interfere with the power of Congress to transfer it as it pleases, or deprive the grantees of any rights under the national grant. (Gibson *v.* Chouteau, 13 Wall., 92; Brewer *v.* Kidd, 23 Mich., 440.)

2. Under this uncontrolled power, Congress granted these lands to the State for the specific and "exclusive" purpose of aiding in the construction of these railroads; "for that use and purpose" only; "to be disposed of only as the work progressed;" "to be applied to no other purpose whatsoever;" "to be subject to the disposal of the legislature, for the purpose aforesaid, and no other;" "to be disposed of by said State only in manner following." By such careful iteration is the grant limited to the expressed purpose.

To enforce this purpose, the penalty is added that "if any of said roads is not completed within ten years, no further sales shall be made, and the lands unsold shall revert to the United States."

By act of 17 February, 1865, (13 Stat., 569,) and again by act of 3 March, 1871, (16 Stat., 582,) Congress granted to the Flint and Pere Marquette Company further time for completion, and extended the time of reversion until 3

March, 1876, a direct exercise of national control, yet maintained, and requested by the State, by resolution of 16 February, 1871.

This railroad, though its work of construction has progressed, is not yet completed. If not "fully completed" at the time named, the lands revert "to which the right to sell shall not then have attached."

3. The grant provided, 1st, that only one hundred and twenty sections could be sold out of twenty continuous miles, as each twenty miles of road were built; 2d, that the public lands remaining within six miles should not be sold for less than double the minimum price, nor subject to private entry until first offered at public sale at the increased price; 3d, that the railroads should be and remain public highways for the national Government, free from tolls for carrying its property or troops, and for transporting its mails at its own price. These provisions show that Congress intended to grant the lands to the State, neither in independent ownership nor for the sole benefit of the State, but *in trust* to secure the building of railroads which would open the public lands to market, give the Government improved transportation and mail facilities, and promote settlement and development.

The grant, then, was conditional on the execution of certain trusts, of benefit to the grantor and of joint benefit to the grantor and grantee, with a reserved right of reversion in a certain event. This, of necessity, implies an interest in the United States until the conditions of the grant are completely fulfilled.

4. But the complete fulfillment of these conditions required, as we have seen, that the lands should be sold, the roads completed, and, by inevitable implication, should be paid for out of the proceeds of the sale. We shall hereafter show more fully that the terms of the trust and good faith to the United States and its honor, compel this construction.

Necessarily, the United States must retain an interest in

the lands to enforce the complete fulfillment of this part of the trust.

5. This interest, then, exempts the lands from the taxing power of the State until they have gone into the body of private lands in the way designated by the law, *i. e.*, by sale, or until the money borrowed by pledge of them to build and complete the roads is repaid out of their proceeds.

Taxation is a sovereign power, which cannot coexist with this higher interest in the United States, and can only attach when that interest is finally extinguished.

Taxation is a direct method of defeating the trust, since it involves the power of sale for non-payment of taxes, which, if the taxes be valid, sweeps away all prior titles and trusts.

These propositions are sustained by authority.

In Rice *v.* Railroad Co., 1 Black, 378, where the grant was like this, Mr. Justice Clifford said: "Neither of those sections contains any words which necessarily and absolutely vest in the territory any beneficial interest in the thing granted. Undoubtedly the words employed are sufficient to have that effect, and if not limited or restricted * * * would properly receive that construction; but the word grant is not a technical word like the word *enfeoff*, and although if used broadly, without limitation or restriction, it would carry an estate or interest in the thing granted, still, it may be used in a more restricted sense, and be so limited that the grantee will take but a mere naked trust or power to dispose of the thing granted, and apply the proceeds arising out of it to the use and benefit of the grantor."

Under the act, in this case, Minnesota territory was held to have "acquired a mere naked trust or power to dispose of the land and carry out the contemplated public improvement therein described." (pp. 379–381.)

In Illinois Central Railroad *v.* McLean County, 17 Ill., 291, a suit in chancery to enjoin the collection of local taxes on lands granted to the Central Railroad Company,

it was said: "The exemption of the donated lands may be regarded as an exemption of the public property until its sale, or the performance of the conditions which will release the lien of the State." And Skinner, J., (page 299,) says: "The period for performance on the part of the company has not expired, and nothing appears in the record to show that there has been full performance on the part of the company, and that the State is discharged thereby from liability to the United States, arising out of the grant to the State. Until such performance, the State has a subsisting interest in the property, and the necessities of self-protection, incident to sovereignties as well as to persons, would seem to suggest the propriety and right in the State of protecting the security from destruction by a sale of the property for taxes." (See also Atkins *v.* Hinman, 2 Gilman, 449.)

In the People *v.* Auditor General, 7 Mich., 84, the supreme court of Michigan, after alluding to the legislation by which lands were appropriated by Congress to aid in the construction of the St. Mary's canal, says: "It is evident from a consideration of these acts that the land was never a part of the public domain of Michigan, either by grant from Congress or by sale to a purchaser before the passage of the act in question, so that the right of taxation had accrued to the State. It was granted to the State for the specific purpose of being applied either by sale or appropriation to the purposes of the construction of the canal. As such it assumed the character of a fund to be expended under the direction of the State; and so the legislature evidently regarded it, and that the State held such land only as a trustee for the accomplishment of that purpose."

Railway Co. *v.* Prescott, 16 Wall., 603, shows that lands granted by the United States are not subject to State taxation so long as any condition attached to the grant remains to be performed. Nor does McShane *v.* Railroad Co., decided at this term, modify this principle. (See also Kansas Indians, 5 Wall., 737; New York Indians, *ib.*, 761.

6. The trust thus created assimilates itself to a charitable

use, and, on the question whether it has been actually executed, and how, the rules which courts apply in cases of charitable trusts should govern.

Although we do not assert that this trust to a State is a charity, under the statute of 43 Eliz., c. 4, we claim that it is of the class of trusts enumerated, in the preamble of that statute, as charitable uses, and should be treated in equity on the same principles.

Among the uses enumerated in the preamble to the statute, are gifts, &c., for schools of learning, free schools, repairs of bridges, ports, causeways, sea-banks, highways, &c. Gifts for promoting public works for the convenience or benefit of the public are considered as charitable uses. (Howse *v.* Chapman, 34 Ves., 542; Attorney General *v.* Brown, 1 Swanst., 265; Attorney General *v.* Helis, 1 S. & St., 67; Attorney General *v.* Dublin, 1 Bligh., N. S., 337; Attorney General *v.* Mayor of Carlisle, 2 Sim., 437; Attorney General *v.* Shrewsbury, 6 Beav., 220; Hill, Trusts, 453.)

In Attorney General *v.* Helis, 2 S. & St., 67–76, Sir J. Leach, V. C., said, that the funds supplied from *the gift of the Crown, or from the gift of the Legislature*, or from private gift, for any legal public, or general purpose, are charitable funds, to be administered by courts of equity. And it is not material that the particular public purpose is not expressed in the statute of Elizabeth, if it come within the equity of the statute.

In Witman *v.* Lex, 17 Serg. & Rawle, 90, C. J. Gibson says that, though the statute of Elizabeth is not in force, yet the principles which chancery has adopted in the application of the statute to particular cases obtain here as part of the common law. And he adds, "Not founding our jurisdiction on the statute, we are not bound, like the English courts, to restrain it to cases specifically enumerated in the preamble.

Without claiming for this court the powers of a court of chancery, to hold a State, like a private person or corporation, to the strict fulfillment of all the duties of a charitable

trust, we do claim that in a case like this, where the question of the extent of a State's obligations, duties, and restraints, under a trust growing out of a gift by the United States to the State for the public benefit, comes regularly before this court in a proceeding directly involving the execution of the trust, the same principles of equity in ascertaining and enforcing the purposes of the gift, and in measuring the responsibilities, duties, and restraints of the trustee, should be applied as the courts of England and America habitually administer in private cases. And one of those principles is, that if the particular charitable purposes be clearly defined by the trust, they must be strictly carried out by the trustee, and any application of the property to a different object will be held a breach of trust. (Hill on Trustees, and cases, 466.)

We submit, therefore, that it is the duty of this court to apply to this case such rules of construction as will secure the complete and effectual execution of this trust in the sense consistent with the purpose, the honor, and the interest of the nation, the donor, to wit: that of payment of the debt incurred in construction by the actual sale of these lands and the application of their proceeds thereto.

Relation of the State to the Trust.

II. The State, as trustee of the United States, retained, and as to roads yet uncompleted or unpaid for, (of which the Flint and Pere Marquette railroad is one,) still retains, an interest in and supervision and control over the lands yet unsold, which are essential until the trust is finally executed by the sale of the lands and the application of their proceeds in payment of the cost of construction, and this interest and control utterly negative any right to tax them as lands in private ownership are taxed.

1. By the act of Congress of June 3, 1856, the grant was to her and was to be *held* by her.

2. By the act of February 14, 1857, she accepted the grant and assumed control of the lands. Although she

therein granted and conferred them on the railroad companies, it was, yet, subject to the direction of the board of control created by the act, and subject to the supervision needful to enforce the trust. All the conditions of the act of Congress are carefully re-enacted and others added.

Maps of the lines located were to be filed with the Governor and Secretary of State. (Sec. 6.) When 20 miles were completed, the Governor was to certify that fact to the Secretary of the Interior, and then, and not before, the companies might sell 60 sections of land, (sec. 7,) the State thereby reducing the amount Congress had authorized them to sell to one half. And when the entire length of road should be completed, the State's board of control should accept it. (*Ib.*) "For the purpose of securing the construction of the roads," &c., and of "properly managing and disposing of the lands," &c., the board of control, with the Governor at its head, was created "to manage and dispose of such lands in aid of the construction of the railroads, * * * and to do any and all other acts necessary and proper respecting the construction and building of such railroads." (Sec. 8.) The lands, in certain cases, were to be selected by agents appointed by the Governor. (Secs. 9, 10.) If the companies failed to accept them or to construct the roads, the board of control might and should declare the lands forfeited to the State, and confer them on other parties. (Sec. 11.) The companies were to be at all times and in all matters subject to the laws of the State and to such rules and regulations as might be enacted "in regard to the management and disposition of said lands." (Sec. 12.)

These, and other provisions, show, conclusively, that the State reserved to herself, as trustee, the right to control the disposition and sale of the lands.

Repeated amendments to this act, providing for the disposal of the lands, prove that this control was maintained, and that only when the lands are finally sold will the State relinquish her supervisory trust over them.

3. True, by act of March 21, 1865, (p. 14,) she authorized

the company to dispose of the lands granted to aid in the construction of their road. But this imported no more than the original act of 1857, so far the State's relation to the lands was concerned. It did not, and could not, relinquish or diminish her trust interest and supervision, for that had its foundation in the act of Congress. It simply made the company the agent of the State to dispose of the lands under the conditions and restrictions of the original acts. But it does not change her legal relation to them.

Nor is the State's relation changed by the fact that as her agent the company pledges or sells them for its own benefit. But this fact creates a confusion of ideas from which grows the claim to tax them. If she had herself managed and disposed of these lands, no prejudice against corporations could have blinded her to the absurdity of taxing them, and so subjecting them to the risk of sale for taxes. In that case, duty to the trust would have compelled her to redeem them herself. Is that duty less plain because she permitted the company to act as her agent?

4. If these taxes be valid, it results that the State, by imposing them, withdraws to her own treasury part of the means entrusted to her "exclusively" to construct the road, and for this small amount she risks the loss of the whole fund by a sale for taxes.

That the State bears this relation to the lands; that it is a relation inconsistent with the exercise of the taxing power; and that the fact that the company was authorized to sell the lands, made it the agent of the State, is shown by Denniston *v.* Unknown Owners, 29 Wis., 351, which was a bill filed by the plaintiff to quiet his title to about seven thousand acres of land which had been taxed, sold, and conveyed by the State to him. The lands were part of the Fox and Wisconsin River grants, and had been transferred by the State to the Fox and Wisconsin Improvement Company, or to trustees for its use, and that company was to make the improvement. It was held by the court that the Improvement Company became agent of the State to improve the rivers, and that the title of the State was not so

far divested as to render the lands taxable while the title remained in the trustees.

See also, Ill. Central R. R. *v.* McLean Co., 17 Ill., 291; Atkins *v.* Hinman, 2 Gil., 449; People *v.* Aud. Gen., 7 Mich., 84; Rice *v.* Railroad Co., 1 Black, 378; and cases *supra.*

5. The State herself did not consider these lands part of her taxable domain. She taxes them by special legislation. If her trust had ceased and the lands had become merged in private ownership on the construction of the roads before their actual sale, no special act was necessary to subject them to taxation. They must, by the mere fact of construction, have become subject to the operation of the general tax laws.

6. If it be said that the lands remain too long exempt from taxation, we answer, 1st They are already bearing the burden of taxation indirectly, by the specific railroad tax hereafter noticed. 2d. If Congress had not chosen to grant them for railroad purposes, they would probably have remained still longer exempt, as an unsold part of the national domain. 3d. Under the act of 1857, the State might have disposed of them by its board of control, and if she chose to remit the duty of sale to the company, as her agent, its delay, if there be any, is her delay, of which she cannot complain or avail herself to the prejudice of the company or its creditors.

The State's Trust not yet Finally Executed.

But the conclusive reason why the State cannot yet tax these lands is, that Congress having granted them on certain trusts, one of which is that they be exclusively applied to build the roads, which necessarily involves the payment of the cost thereof out of their proceeds, they must be exempt until that trust is executed by payment of the cost of construction out of the proceeds of their sale.

1st. That payment of the cost of construction out of the proceeds of the lands is a necessary part of the trust which

the State must see fulfilled before her relation of trustee ceases, is the only construction consistent with the due execution of the trust and with the honor and good faith of the United States and the State. It is, of necessity, involved in the relation of trustee. The trust is for the benefit of the company who construct, and the creditors who furnish the means on the faith that the lands will be honestly preserved as their security. They are the true *cestuis que trust.* This was the view taken in Denniston *v.* Unknown Owners, 29 Wis., 360, *supra*, a case, on its facts closely, and in principle, exactly, like this. The court say: "When the act of 1856 * * was passed, the time limited for the improvement company to complete the work and to pay and discharge the debts and liabilities against the improvement fund, had expired, and the work remained unfinished and the debts unpaid. In disposing of the additional lands granted to the State, it is natural to suppose that the legislature intended to secure the accomplishment of these most desirable objects. It must be presumed that by the act of 1856 the legislature intended to so dispose of these lands as to secure the completion of the work as soon as practicable, and *also the payment of all lawful claims and demands against the improvement fund. In no other way could it fully discharge its obligations to the United States which it had voluntarily assumed.*"

2d. The mortgage and trust deeds of 1866 and 1868 do not amount to a sale of the lands, nor make the creditors they secure, purchasers.

True, if the creditors permit the lands to be sold for taxes, their interests will be fatally impaired, since the tax sale, if valid, destroys their lien. (17 Ill., 291, *supra.*)

But the title to the lands is not in them. It is where the acts of Congress and the State have placed it, viz: partly in the State, in trust, to see that the conditions of the grant are performed, with a right of reversion in the United States until those conditions are completely performed, and a beneficial interest in the company which will draw to it both these conditional interests when the

road shall have been completed and paid for out of the lands, as to all lands left unsold after it is so paid for. As to lands sold under the power of sale in the mortgages, these interests become merged in the purchaser, who thus acquires a perfect title, and then the State's right to tax, accrues.

As to the residue of unsold lands, if there be any, a perfect title will vest in the railroad company by merger of the United States and State trust interests, respectively, only when the cost of construction is completely paid. Then the liability of such unsold residue to taxation will stand on a different footing.

But in no aspect can the bond holders be treated as purchasers or their mortgages as deeds of sale.

Congress made the State its trustee, with a power of sale, in a prescribed manner, for a designated purpose. The act of 1856 grants the lands for that purpose, to be "disposed of" by the State in the prescribed manner only, and the 4th section shows that by "disposal," Congress meant, *sale.*

To ascertain the present legal *status* of these lands we know no better method than to apply the settled rules by which courts of equity enforce and test the execution of powers of sale by trustees.

It is well settled that a power of sale can be exercised only in the mode, and subject to the conditions, prescribed in the instrument creating the power. (Wright *v.* Wakeford, 17 Ves., 454; Blacklow *v.* Laws, 2 Hare, 40; Hill, Trust, 478.)

It is equally well settled that a power to sell is not fully executed by a mortgage. In Perkins *v.* Walker, 1 Ver., 97, and Thorne *v.* Thorne, 1Ver., 141, cited with approbation by Mr. Sugden in his Treatise on Powers, it is ruled that if a man have a general power of appointment and of revocation, and he appoint to one in fee, by way of mortgage, the power is considered as wholly executed at law; but as equity considers a mortgage a security for the debt, the appointment in equity operates as a partial execution only,

and it is a revocation of the prior uses and trusts only *pro tanto*.

In Asay *v.* Hoover, 5 Barr, 20, it was held that a power to sell was not exhausted by a mortgage.

If it be the clear intention of a testator in directing a sale that his real estate should be *absolutely converted*, a mortgage will not be a proper execution of the trust, for the testator's intention would thus be frustrated. (Haldenby *v.* Spofforth, 1 Beav., 390; 1 Sugden Pow., 538, 6th ed.)

Here the learned circuit judge fell into the error which misled him. He rests his judgment "on the broad ground that whenever the State, by any mode, has caused divisions of the road to be built, either with means derived directly from a pledge of the lands or from the proceeds of a future sale, although it continues to hold the title, this constitutes such an appropriation to the uses of the trust as would prevent reversion to the United States and constitutes, within meaning of the act, a sale."

In briefer words, he held that the mortgage of the lands amounted to a sale of them within the congressional meaning, which completed the execution of the trust.

We admit that the chief purpose of the grant was the construction of the roads. But the method by which that purpose was to be effected was, necessarily, the conversion of the lands into money, by sale. The act of 1856 authorized the State to sell 120 sections before the road was begun, to raise money to start with. On the completion of each 20 miles, 120 sections more were to be sold. This clearly shows that Congress meant that the work should be done by the *sale* of the land and the use of their proceeds.

Nothing less, then, than an actual *sale* of the lands, whereby their proceeds should accomplish the purposed work, will satisfy either the words or the spirit of the act.

But it was found that the lands could not be made available by the method prescribed in the act, viz, by sale in such small parcels, in advance of the construction of the road. It was found necessary to raise the money before

the work began, and as, without the road, the lands had not the requisite market value to raise it by their sale, the plan was adopted of raising it by pledging in repayment the proceeds to be realized by the sale of the lands after they had become marketable and valuable by the construction of the road. Since the persons who were to furnish the money did not want the lands, and since the lands could only be made valuable enough to furnish the requisite money by the actual construction of the road through them, the only method by which the purpose of the act could be accomplished, was, to promise to those who advanced the money that when the road was constructed, the lands should be sold and the proceeds applied to the repayment of the loan. Hence, their actual sale, in the prescribed method, was postponed, and the more effective process substituted, of transferring them by mortgage to trustees, with a power of sale to the trustees to sell the lands and apply the proceeds of such sales to the redemption of the bonds secured by the mortgage. *And these sales by the trustees under the mortgage, are the sales which satisfy the words, and effect the purpose, of the act.* Under this plan the money was raised, the road has been, and is being, constructed, and the trustees are selling the pledged lands, and, with their proceeds, redeeming the bonds.

It is perfectly clear that the prescribed method of sale, before construction of the road, was impossible of execution, and, if adhered to, would have utterly defeated the main purpose of the act.

It is equally clear that it was the process of mortgage whereby the money was raised, the road constructed, and the lands made saleable, and that it is this process which is effecting their sale.

The mortgages, then, were simply the first step in the process by which the controlling purpose of Congress, viz, the construction of the road by sale of the lands, was accomplished; but they were not themselves, sales. That consummation is only reached when the trustees convey the lands to purchasers whose money goes to redeem the

mortgage bonds. Then, and not till then, is the intent of Congress effected and the State's trust discharged.

Since, then, the main purpose of constructing the road could only be effectuated by the conjoint method of mortgage to trustees before construction, and sale by the trustees after construction, we submit that this court will infer that conjoint method of sale to be in accordance with the meaning of Congress, and that there is no sale, and consequently, no complete execution of the State's trust, until sale made by the trustees under the mortgage.

3. The mortgages were not sales, for the vital reason that they have left the burden of the cost of construction on both the lands and the road, a debt which can only be discharged by the conversion of the lands into money by sale.

The fiction that the mortgage is a sale which discharges the trust, leads to this result: that if the State tax them, the taxes must be paid by the company who owe the debt, or, by the creditors to whom it is due, and, in either case, they add to the burden of it by increasing what the company must pay or diminishing what the creditors should receive. Now, under the act of 1856, the company are entitled to *all* of the lands or their proceeds, to aid in construction, which they do not receive if part of them are taken to pay taxes. And if the creditors must pay the taxes, they are applying a part of the debt due them, on which no tax is assessed, to pay taxes on land they do not own and out of which they never can recoup themselves. This is, by indirection, a tax on their bonds, which, being held by non-residents of the State, is clearly illegal. (15 Wall., 300.)

But the case is even worse. If the State, on the theory that the mortgage is a sale, may tax at all, she may tax the lands so much that neither the company nor the creditors could afford to pay the taxes. Then, the lands would be sold for taxes, and the company would have its unpaid debt without its means of payment, and the creditors their

claim without its pledged security. And this, on the theory that they had purchased the land!

In either case, the State is diminishing or destroying the trust fund for her own benefit. This court will hardly adopt the fiction of a sale in order that a trustee, even though a State, may use its power over the trust estate for its own benefit and to the prejudice of the *cestui que trust.* Fictions are invoked to aid, never to frustrate, justice.

4. A mortgage is only a lien on land, and the title and estate remain in the mortgagor until after foreclosure and sale. The contract of mortgage is, that the mortgagee may take the mortgaged land in discharge of his debt, if the mortgagor fail to pay at maturity, and even then equity relieves him by treating the land as security for repayment. (1 Hilliard on Mort., 102–163–'4, and cases cited.)

The legislation and decisions of Michigan are full and explicit to this point.

The act of 1843, (sec. 61, Ch. CXCV, Rev. Stat., 2 Dewey's Comp., 1775,) provides that no action of ejectment shall thereafter be maintained by a mortgagee or his assigns, &c., for the recovery of the mortgaged premises until the title thereto shall have become absolute upon a foreclosure.

That a mortgage, there, conveys no title to mortgagee till after foreclosure and sale, until which time it is only a lien as security for the debt, see Hogsett *v.* Ellis, 17 Mich., 363; Newton *v.* Sly, 15 Mich., 396; Crippen *v.* Morrison, 13 Mich., 23, which holds that the mortgagor, until actual foreclosure, is in possession by right, not by sufferance, and may use his property as any other person could during his term.

In Ladue *v.* Detroit and Milwaukee R. R. Co., (13 Mich., 380,) where the whole question is learnedly discussed, it is said, that "a mortgage in this State, both at law and in equity, even when given to secure a debt actually subsisting at its date, conveys no title of the land to the mortgagee, (especially since the statute of 1843, taking away ejectment by the mortgagee,) that the title remains in the

mortgagor until foreclosure and sale, and that the mortgage is but a security in the nature of a specific lien for the debt, has been already settled by the decisions of this court. This is in accordance with the well settled law of the State of New York, from which our system of law, in regard to mortgages, has been, in a great measure, derived." (Jackson *v.* Willard, 4 Johns., 41; Collins *v.* Torrey, 7 Johns., 277; Runyan *v.* Messereau, 11 Johns., 534; Gardner *v.* Heartt, 3 Denio, 232; 21 Wend., 467; 2 Barb. Ch., 119; 22 Barb., 504; 31 *Ib.*, 201; 21 N. Y., 342.) And the court repeats that the title, for nearly all practical purposes, is now recognized, both at law and in equity, as continuing in the mortgagor. See also, Caruthers *v.* Humphrey, 12 Mich., 278, that "the estate in the land is still in the mortgagor." Dougherty *v.* Randall, 3 Mich., 270; Blake *v.* Pearson, 5 Mich., 456; Blackwood *v.* Van Vleet, 11 *Ib.*, 252; and Gorham *v.* Arnold, 22 *Ib.*, 25, where the chief justice says: "We have used an antiquated phrase (equity of redemption) to describe an interest which has always been treated as *a legal estate* by our tribunals."

In Ewer *v.* Hobbs, 5 Met., 3, C. J. Shaw, declaring the estate to be in the mortgagor, says that all statutes are to be so construed, and all rules of law, whether in law or equity, are to be so applied as to carry this object into effect. And see Brobst *v.* Brock, 10 Wall., 519; and Mr. J. Field in The State Tax on Foreign Bonds, 15 Wall., 322–323.

5. The foregoing cases settle that an overdue mortgage, before foreclosure and sale, does not vest the title or estate in the mortgagee. But we are asked to treat these mortgages with a power to sell and apply the proceeds in discharge of the debt, as a purchase which vests the title and estate in the mortgagee, *before the debt is due!*

6. This error, that the deeds of trust and mortgages constitute a sale amounting to a complete execution of the trust within the meaning of Congress, although the money borrowed on the lands is not yet repaid, leads the

learned circuit judge into a strange misapplication of certain principles. He says: "What the General Government intended has been accomplished. The act has been done which, under the statute, vested the power of sale. Upon every principle of common reason and technical law, beneficiaries, who have advanced money upon the faith of a title to be subsequently created by the execution of the trust, would have a right to its enforcement, were the parties amenable to judicial proceedings."

Beneficiaries who have advanced money upon the faith of a title to be subsequently created by the execution of a trust, may, undoubtedly, enforce the trust. If these bondholders were seeking to enforce this trust against the company and the State after their right to repayment had accrued, so as to secure their money, or, failing that, the sale or possession of the lands, they might well invoke this principle. But *they* are not seeking to enforce the trust to secure repayment. They could not if they would, for their debt is not due. They are resisting the trustee's attempt to diminish their fund, because such diminution is infidelity to the trust relation, and, until the trust is fully executed, the trustee should not be permitted to act as if it were executed. As against them, the trustee cannot ask that equity shall treat the trust as executed so as to relieve him from its restraints. This would be to convert a defensive shield of beneficiaries into a weapon of assault on them, in the hands of their trustee.

We admit, with the learned judge, that a power of sale *to raise money* is well executed by the creation of a mortgage, for that purpose. But we deny that the mortgagee, from whom the money is raised, is bound to treat the mortgage as a sale, and accept the land instead of his money, (and that before it is due,) at the instance of the mortgagor, because the borrower saw fit to raise the money by mortgage, instead of by sale. We deny that, *proprio vigore*, such a mortgage will pass the estate.

We admit, too, that a party entitled to the proceeds of land under a deed of trust or a will, may take the lands

himself and forbid the sale. But we deny that he can be forced to do so against his will, or that equity will treat the land as his when he does not want it, and before he is entitled to the proceeds; nor will equity, in such case, treat the land as his for any other purpose than for his protection.

It may be that when these bonds fall due, if the lands are then unsold, the bondholders may foreclose and take the lands in payment. But this court, because they may, *for the protection of their debt, then*, treat the lands as if they were their's, will hardly, *now*, apply that principle to their prejudice, in favor of a trustee, to aid escape from trust duties and restraints.

Nothing but a strained and unnatural view of this case could have suggested this singular misapplication of presumptions which courts of equity raise for the benefit of creditors whose rights they are enforcing. The case rests on the simple proposition; that Congress meant that the lands should be sold to build the roads; that the process of mortgage with power of sale, was adopted as the method by which the sale might be effected, the proceeds thereof to go in discharge of the mortgage debt; that under this process the lands are being sold and the debt paid, and, when it is all paid, or the lands are all sold, the trust created will have been finally executed. But until that time, the lands yet unsold are objects of the trust, in which the nation, as grantor, has such an interest, and to which the State, as trustee, has such a relation, that the taxing power of the State cannot attach thereto.

The construction that the trust is executed by merely raising money on the lands, and that the carefully chosen and reiterated words of Congress mean only that the roads should be built, and not that the proceeds of the sold lands should build them, can, then, only be sustained by accepting as true these untenable propositions:

1st. That a mortgage of land is, *ipso facto*, a sale which compels the mortgagee to take the land in payment of his debt, even though his contract be that it shall be sold to others whose purchase money is to pay his debt.

2d. That the mortgage thus, instantly, operates as a sale, even though the debt it secures be not yet due.

3d. That Congress intended to endanger the execution of its main and controlling purpose of having the roads constructed, for the sake of compelling the adoption of an impossible method of disposing of the lands, viz, by absolute sale and conversion, in advance of construction, (a mere matter of subsidiary detail;) since the money for construction could only be raised by the conjoint process of mortgage to trustees, and sale by those trustees to pay the mortgage.

4th. That the State has power to diminish, by taxation, the property which she agreed to hold and apply, exclusively to the purpose of the grant, before it has been so applied.

5th. That the State may subject the trust property to sale for taxes, and thus defeat the execution of the trust.

6th. That Congress could have been capable of creating a trust to secure a railroad at the expense of those whom it had induced to invest their money in it, and of exposing them to the burden and danger of diminution, or absolute loss, of their security, by the act of its trustee, for her own benefit.

If the intent of Congress is fulfilled by the construction of the road only, whilst the money borrowed to build it is yet unpaid, these conclusions are inevitable.

We submit, therefore, that the purpose of Congress is not satisfied, nor the State's trust executed, until the lands have, in fact, been sold by the trustees under the mortgages, and their proceeds applied to discharge the mortgage debt; and

That, until they are so sold, both the United States and the State have an interest in, and relation to, them, either of which is inconsistent with the State's power to tax them.

The Taxes a Violation of Obligation of the State's Contract.

Points III and IV.

I. We have shown that the lands were granted to the State on the trust that they should be exclusively applied to aid the construction of the railroads named, and diverted to no other purpose; that the State accepted them on the conditions stipulated, and that she granted them to the railway companies on those conditions, and others of her own exaction; that the Flint and Pere Marquette Company accepted its grant charged with these conditions, by writing, duly executed and filed as required, whereby it agreed to build a road between the designated points, out of the proceeds of the granted lands, which should be and forever remain a public highway for the United States, free from toll for the transportation of its property and troops; to carry the mail at its prices; to build and put in complete running order 20 miles in each year, and to relinquish the right to sell 120 sections as each 20 miles were completed, (as Congress had authorized,) and take 60 sections in lieu thereof, until the entire line was completed; that the company, by the pledge of the lands, borrowed money to construct, and had constructed when the tax was assessed, 120 miles of its road, and was proceeding to its completion; and that, under a power of sale in the mortgage and trust deeds, it had sold and was selling the lands so pledged, and applying their proceeds to the redemption of the bonds secured by the mortgage and trust deeds.

These facts establish a contract between the State and the company, the impairment of the obligation of which is prohibited by the Constitution.

The substance of the contract was that the lands granted in trust to the State were by the State accepted and granted to the company, to aid in the construction of its road, on the conditions prescribed by Congress and itself. First

and most conspicuous of these conditions was that the lands should be applied "exclusively" to the work of construction, and "to no other purpose whatsoever." To ensure the observance of this condition, Congress and the State, its trustee, withheld from the company the right to sell the lands until certain portions of the work were completed. Although this was a restriction on the company, it was also a promise by the State to the company that when it did the work, the lands should be "exclusively" applied to "aid" that work, and "to no other purpose whatsoever." In other words, if the company constructed the road, it should have the lands without diminution or impairment, to pay for that construction.

The State, then, whilst the lands were carrying the burden of this loan, and before their sale for its redemption, added yet another burden, by taxing them under the acts of 1873, although the railway company was then paying specific taxes.

These taxes work a substantial diminution of their value, reduce the amount to be realized from them, and to that extent, divert their proceeds from the work of construction. And this, of course, impairs the value of the bonds they secure.

This is a plain breach of the most important stipulation of the original grant and of the State's grant, and it is within the inhibition of article I, section 10, of the Constitution of the United States.

The Taxes a Violation of Obligation of Contract in section 20 of Act 14 February, 1857.

II. Another obligation of the contract, binding on the State, was contained in section 20 of the act of February 14, 1857, which stipulated that, in consideration of the grant of land and other privileges thereby conferred, the company was required to pay into the State treasury, as a specific annual tax, one per cent. on the cost of the road and its equipments and appurtenances, of whatever kind, and

the legislature might, in their discretion, after ten years, impose a further tax on the gross earnings, not exceeding two per cent., which should "be in lieu of all other taxes within this State."

The substance of this contract was, that the State, in consideration of the grant, &c., would exact certain specific taxes heavier than those imposed on other companies by existing law, which should be in lieu of all others. It was an explicit engagement to impose no other than these specific taxes.

1. By amendment to the act of February 14, 1857, passed February 14, 1859, section 2, the land-grant companies were subjected to the rate of taxation provided by the 45th section of the general railroad act of February 12, 1855. This rate was "one per cent. on the capital stock paid in, which shall be in lieu of all other taxes;" a rate more favorable than that fixed by the original contract, but, like it, a specific tax.

The 45th section of the act of February 12th, 1855, was supplied by the act of May 18th, 1871, which imposed a specific tax on gross receipts, "in lieu of all other taxes on the property of the company, whether real, personal, or mixed."

This act was, in turn, supplied by article 3, section 3, of act of May 1, 1873, (the existing law,) which imposes a specific tax on gross receipts, "in lieu of all other taxes upon the property," &c., with an exception as to real estate, which constitutes, in part, our ground of complaint.

These acts show that specific taxes were continuously exacted, and that the State has always enforced against the company its right reserved in the 20th section of act of February 14th, 1857.

2. Even if this agreement to exempt from all other forms of taxation, had been inserted in the charter, unsupported by a special consideration, it would have bound the State.

But it was a contract made after the company's organ-

ization, for a consideration of great value to the State, and was, in no sense, a legislative benevolence.

Congress, on certain considerations of national and State welfare, apparent in the act of 1856, had offered these lands, through the State, to induce the organization of railway enterprise. Early in 1857, the F. &. P. M. Company was organized under this stimulus, and the State granted it the lands on the stipulated terms.

The company was then subject to the specific tax of one per cent. on its "*paid in*" *capital stock* under the act of 1855. This paid in stock, of course, did not exceed the amount required by that act. The State, regarding the land grant as a valuable gift, "in consideration of the grant," &c., imposed a greater specific tax than the general railroad law exacted, viz, one per cent. on the *cost of the road*, &c., and reserved the right, after ten years, in its discretion, to add a further tax on gross receipts. Here was taxation, "in consideration of the grant," greatly in excess of existing, or prospective, taxation on other roads. But, because of this unequal burden, present and prospective, the State pledged itself that it should "be in lieu of all other taxes within the State." With this burden the company accepted the grant, and entered on its work, because the State had promised that, though unequal, it should be its only burden.

The contract, therefore, was supported 1st, by a consideration of benefit to the nation, (whose trustee it was,) in the increased sale and price of its lands, in the right to use the road for certain purposes free of toll, and for postal purposes, at its own price; 2d, of benefit to the State and nation, in the development of wealth and population which the railroad would bring, and; 3d, special benefit to the State, in the greater revenue which the increased and unequal tax would yield her.

The company accepted the task, borrowed money on the faith of this legislation, fulfilled its share of the contract by opening up the wilderness, giving value to the public lands, free transportation and increase of revenue to the nation, and to the State its exacted special tax.

3. Since the Dartmouth College case, (4 Wheat., 316,) nothing is better settled than that a grant to a corporation by a State is binding on the State, even if voluntary.

As Mr. Justice Bradley said, in Salt Company *v.* East Saginaw, (13 Wall., 373:) "It is unnecessary at this time to discuss the question of power on the part of the State legislature to make a contract exempting certain property from taxation. Such a power has been frequently asserted and sustained by the decisions of this court."

In an army of cases, railways, banks, charitable institutions, and other corporations have been shielded from subsequent State taxation by virtue of a prior legislative exemption, in whole or in part. Among these are: New Jersey *v.* Wilson, 7 Cranch, 164; Providence Bank *v.* Billings, 4 Pet., 560; Gordon *v.* Appeal Tax Court, 3 How., 133; Piqua Bank *v.* Knoop, 16 *Ib*, 369; Ohio Life and Trust Co. *v.* Debolt, *Ib.*, 416; Dodge *v.* Woolsey, 18 *Ib.*, 331; Jefferson Bank *v.* Skelley, 1 Bl., 436; McGee *v.* Mathis, 4 Wall., 148; Home, &c., *v.* Rouse, 8 Wall., 430; Furman *v.* Nichol, *Ib.*, 44; Chicago *v.* Sheldon, 9 *Ib.*, 50; Wilmington R. R. *v.* Reid, 13 *Ib.*, 264; Raleigh and Gaston R. R. *v.* Reid, *Ib.*, 269; Humphrey *v.* Pegues, 16 *Ib.*, 244; Delaware R. R. Tax, 18 Wall., 225.

In McGee *v.* Mathis, (4 Wall., 143,) where Arkansas, to promote the drainage and sale of swamp lands granted by Congress, passed a law, to encourage purchasers, that such lands should be exempted from taxation for ten years, and issued transferable scrip receivable for them, a repeal of the exemption act, so far as it concerned lands paid for before or after the repeal with scrip issued before the repeal, was held to impair the contract of the State with the holders of such scrip.

In Home of the Friendless *v.* Rouse, (8 Wall., 430,) where a charitable institution had been chartered by Missouri with a clause exempting it from taxation, an act taxing its real estate was held void; and, to the argument that there was no consideration for the release of taxation, the court, by Mr. Justice Davis, said: "There is no neces-

sity of looking for the consideration for a legislative contract outside of the objects for which the corporation was created. These objects were deemed by the legislature to be beneficial to the community, and this benefit constitutes the consideration for the contract, and no other is required to support it. This has been the well-settled doctrine of this court on this subject since the case of Dartmouth College *v.* Woodward."

In Wilmington Railroad Co. *v.* Reid (13 Wall., 264,) the exemption from taxation in a railroad charter is held binding on the State as a contract. And in the kindred case of Raleigh and Gaston R. R. Co. *v.* Reid (*Ib.*, 269,) it is said: "When a statute limits a thing to be done in a particular mode, it includes a negative of any other mode. It was the manifest object of the legislature which incorporated this company to invite the investment of capital in the enterprise of building this road, and no means better adapted to the purpose could have been devised short of a total immunity from taxation." Here, the court held a restricted power of taxation, as to that road, binding as a contract on the State. See also Neustadt *v.* Ill. Cent. R. R., 31 Ill., 484; Humphrey *v.* Pegues, 16 Wall., 244; Hawthorne *v.* Calef, 2 Wall., 10; Woodruff *v.* Trapnall, 10 How., 190; Curran *v.* Arkansas, 15 How., 304; Suydam *v.* Broadnax, 14 Pet., 67, and cases cited *supra.*

Not one of the cases, from New Jersey *v.* Wilson to the last case, presents a stronger example of binding contract, and attempted violation of it, than the case at bar.

4. Nothing in the act of February 14, 1857, justly construed, contravenes these views.

Stress is laid on the clause at the end of section 7, declaring that none of the lands should be liable to taxation for seven years from September 1 then next, except such as should be actually sold, as implying a purpose to tax them after that time. But this clause must be construed with section 19, which provides that the entire length of the respective roads should be completed within seven years from November 15 then next. The latter is a man-

date to complete the roads within the time the legislature then thought sufficient, viz, seven years, and the former is a legislative assurance to those who might risk their money on lands having then little present or prospective value, that they should not be taxed until the roads were completed their entire length, viz, seven years, when, as was naturally supposed, they would all be sold. This clause strongly supports the view that the legislature did not intend to tax the lands until they had performed their work of paying for the construction of the roads, and then passed into private ownership.

This construction is confirmed by the act of March 11, 1861, (p. 13,) which amends sec. 7 of the act of 1857, by increasing the quantity of land the companies might sell, when 20 miles of road were completed, from 60 sections to 120 sections. In this amendment, in almost the same words with sec. 7, the clause as to none of the lands being liable to taxation for seven years, is omitted. This significant omission is equivalent to a legislative declaration that no time for taxation could be fixed until the roads were completed. For, by that time, 1861, the legislature had learned, from the obstacles in the way of these enterprises, that no future period could be safely predicted for their completion, and, therefore, no time be fixed when the lands, having done their work, would merge into the body of private lands.

In Chicago *v.* Sheldon, 9 Wall., 50, this court regarded the action of the parties in imposing no tax from 1859 to 1866 as a significant cotemperaneous construction put on the language of the act. This seven year clause of sec. 7, repealed in 1861, would have expired in 1864. The action of the state since that time shows the understanding between both parties, as to their rights under the grant, to have been as we now claim.

If this construction of that clause be wrong; if the legislature meant it as an assertion of power to tax after a fixed time, whether the roads were constructed or not, it was simply void. For, the right to tax did not then exist,

and whether it would exist in seven years depended on facts that could not be anticipated. The assertion of the power to tax would not prove that the power existed, but only that the legislature mistakenly thought it did.

5. That the Legislature, in passing the act of 14th February, 1857, considered its provisions as making a contract with the companies which it could not afterwards revoke, if by them accepted, is proved by section 12. It provides that all of said railroad companies shall, at all times and in all matters, be subject to the laws of this State, and to such rules and regulations as may from time to time be enacted, &c., by the Legislature, &c., in regard to the management and disposition of the said lands, *not inconsistent with the provisions of this act* and of the act of Congress, &c.: *Provided*, That nothing herein contained shall be so construed as to relinquish the right of the State to any specific tax imposed upon any railroad company within this State.

Here is a distinct declaration that the Legislature is making a contract, the provisions of which would be irrevocable by subsequent Legislatures, but that the railway companies should still be subject to the laws of the State, &c., in all those matters which were not settled between the State and the companies by that contract. And specially, that whatever rights of legislation the State might be relinquishing by the contract, it still retained the right to impose specific taxes.

Could implication be stronger than in this last clause, that the State thereby conceded that it had relinquished the right to impose any other than a specific tax.

6. The amendments to the act of 1857, relaxing its conditions, (*vide* pages 10–15,) were made in the interest, and at the instance, of the companies, to aid them in the struggle to execute their contracts. Some of those conditions were found too stringent. Thus, time enough had not been given to complete the roads; hence the acts of 1858, February 12, 1861, 1863, and 1865, extending the time. So, too, with the restriction in section 7, on the sale of more than 60 sections to each 20 miles built. By the acts

of February 14, 1859, 1861, 1863, and 1865, the right to sell was enlarged to 120 sections, as the act of Congress had provided. And so, too, the specific tax on the cost of the road and gross earnings in section 20, frightened capital; hence the act of February 14, 1859, substituted the lighter specific tax of the general law of 1855, on the "paid-in stock," and the act of February 15, 1859, repealed section 20, in terms, leaving the tax on the paid-in stock as the only tax.

These amendments are no proof of legislative changes of the act of 1857, inconsistent with our position that it was an irrevocable contract, for they were enacted for the benefit, and at the request, of the companies. Concessions to the companies, the law will presume that they were accepted by the companies, though the amendments required no evidence of such acceptance to be filed.

No inference, therefore, can be drawn from these amendments that the Legislature had power or right to change any stipulation of the act of 1857 to our prejudice. There can be no such presumption of assent to a change which injures the company as attends a change for which it asks and by which it profits. This breach of contract, the first and only one attempted by the State, has never been assented to in any form by the company, but has always been resisted.

The Land Grants included in Contracted Exemption of 20th Section.

7. But it is objected that the contract of the 20th section to exempt from all but specific taxes does not apply to these lands, because such an exemption applies "only to property which is used in the performance of the public duties of the corporation, and does not include that held for general investment or profit."

We think this an utter misapplication of the rule in question.

Where railroad property has been exempted by law from

all taxation, or been subject to special, in lieu of other, taxation, the question has repeatedly arisen, what real estate is included in the exemption from all, or from other, taxation, within the meaning of the law?

The cases are not entirely uniform, but the rule to be extracted from them, we think, is, that all real estate, reasonably appropriate and convenient to the exercise of the franchises of a railway company, is included in the exemption.

In Worcester *v.* Western R. R. Co., 4 Metcalf, 564, land within the limits of the authorized road width, and buildings thereon, *reasonably incident to the support of the road*, or to its proper and convenient use for carriage of passengers and property, was held exempt.

In Gardner *v.* State, 1 Zab., 557, the exemption was extended to such property as might necessarily be held for purposes *reasonably incident* to the enjoyment of the corporate franchises.

See also Wilmington *v.* Reid, 13 Wall., 304; Vermont Cent. R. R. Co. *v.* Burlington, 28 Ver't, 193; Lehigh Nav. Co. *v.* Northampton Co., 8 Watts, and Serg., 334; Railroad *v.* Berks Co., 6 Barr, 70; State *v.* Newark, 1 Dutch, 315; State *v.* Mansfield, Zab., 510.

In the State *v.* Hancock, 35 N. J. L., 537, the exemption was held to extend to a tract of gravel land purchased to provide materials for the repair of the road, and to a branch road connecting the gravel pits with the tramway, and the court, adopting Chief Justice Marshall's limited meaning of the word "necessary," in McCulloch *v.* Maryland, says, "a power obviously appropriate and convenient to carry into effect the franchise granted has always been deemed a necessary one."

In The State *v.* Haight, 35 N. J. L., 40, the same court says, that in applying such clauses of exemption, the test of actual use of property by a company for its purposes may be proper where the road with its appendages is completed. But where the road with its appendages is not completed, the test of actual use is inapplicable, and the

exemptive words must be extended to property which has been acquired as the means of carrying into effect the objects of the charter.

In Bibb Co. *v.* Central R. R. Co., 40 Georgia, 646, an exemption of the capital stock of a railroad company was held to extend to any property of the company necessary and proper *for the building and sustaining of its road.*

In N. Y. and E. Co. *v.* Sabin, 26 Penn. 253, Mr. J. Woodward says, "when, however, instead of surrendering the power, the Legislature have exercised it by taxing all the property of a company in a specified manner, and have intimated no design to subject it to further taxation, we hold the powers to be satisfied, and do not add by judicial implication burdens which the Legislature have not thought fit to impose."

We note these cases out of respect to the circuit court. But we do not think they have the slightest application to the present case.

The lands in question are not held by the railway company for any purpose of use in connection with the running of its road or the exercise of its ordinary business. Neither are they held for general purposes of investment or profit. They were the gift of Congress to build the road. They are the substance out of which the road is being built and equipped. They constitute a part of the capital stock, taking the place, and doing the work, which the money paid in by shareholders does in ordinary railway enterprises. It being desirable to penetrate the Michigan wilderness by railways, and capital not being willing to sink money in an enterprise so purely for the public good, Congress substituted the lands for the money, and directed their application to aid exclusively in constructing the road. This they are doing by the process of mortgage and sale.

Lands held by railway companies for investment or profit, or for purposes merely convenient to the business of their roads, are purchased out of the capital stock or other assets, and held incidentally to the main business. And

as to these, questions of taxation, as in the cited cases, properly arise. But the lands in question, standing in place of the paid in stock, are in no sense of that class. They are as much property exempt as the paid in stock, or the road bed, rails, and rolling stock which they are pledged to pay for. It is directly out of their pledge and sale that the road exists, that its business is prosecuted, and that it earns the money to pay its specific tax. Without the lands, the road would have been a project, not a fact, and the State would have had neither the development of resources nor the increased revenue both from the country developed and the road itself.

It matters not, therefore, whether the rule as to exempted property be settled according to the measure of a loose convenience or a rigid necessity; it cannot wrest these lands from the protection of the contract in the 20th section. For, no matter how rigid a necessity to the purposes of the railway the rule may demand, they will more than stand the test.

No Power Reserved by the State to Impair the Contract.

Point V.

The constitution or laws of Michigan, in force when this contract was made, conferred no power on the State to impair it, to the prejudice of the company, or its creditors, by imposing the tax in question.

1. We have seen that in the act of 1857 itself, the reservation of power in section 12, which subjects the contract companies to the laws of the State, and to such rules and regulations as may, from time to time, be enacted by the Legislature, in regard to the management and disposition of the granted lands, is expressly limited to such as are not inconsistent with the provisions of the act. That is to say, the act of 1857 asserts for the State the right to subject the companies to its laws, and to such rules and regulations as it may make in regard to the management and disposition

of the granted lands, which will accord with the contract it has entered into. And it especially refuses to relinquish its right to impose specific taxes. By inevitable implication it follows, that the State, not only asserted no right to make laws, rules, and regulations inconsistent with the contract, but waived any such right as it might otherwise have possessed.

So that the State embodied in the contract, as part of it, the agreement not to make any law, rule, or regulation which would be inconsistent with, *i. e.*, violate, the contract. This clear waiver of the right to exercise any legislative power inconsistent with the terms of the contract, and the special reservation of the right to impose a specific tax, as contained in the 12th section, taken in connection with the express engagement of the 20th section to impose specific taxes in lieu of all others, amounts, we submit, to an explicit engagement of the State that it will pass no law to impair the contract, especially no law to impose any but specific taxes.

The act of 1857, therefore, so far from authorizing any change of its contracting provisions, expressly relinquishes such authority, and especially authority to change its provisions in regard to taxation. If such authority exist, it must exist both outside of, and in spite of, that act.

2. Nor is there any such authority in the general law of February 12, 1855, or in either of its successors of April 18, 1871, or May 1, 1873. On the contrary, both these latter acts, whilst providing for alteration, amendment, or repeal, expressly save rights of property. (Sec. 50 of act of 1871; sec. 13, art. 5, of act of 1873.)

These clauses of the acts of 1871 and 1873 are important, not only as evidence that the Legislature did not claim or reserve the power to take away rights of property by alteration, amendment, or repeal of existing laws, but they raise a strong presumption that their respective provisions for taxing the real estate of railway companies were not intended to include lands protected from such taxation by the stipulation of the 20th section of the act of 1857.

3. The legislative power to amend, alter, or repeal, in Michigan, is reserved, by virtue of article 15, section 1 of the constitution and the 20th section of the revised statutes of 1846, chapter 55. (See 2 Dewey's Comp., chapter cxxx, page 1152.) The statute subjects to amendment, alteration or repeal, at any time, at the pleasure of the legislature, "every act of incorporation passed since the 20th of April, 1839, or which shall be hereafter passed."

The constitutional clause is as follows:

Art. XV, sec. 1. Corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes. All laws passed pursuant to this section may be amended, altered, or repealed.

The reservation in this clause, being apparently broader in terms (as it is later in date) than the statutory reservation, the question is, does this constitutional reservation confer the power to impair the contract in this case by taxing the lands?

It is a reservation carefully limited. To enlarge or pervert it into an authority to invade rights secured by a legislative contract like the one in question, would be contrary to the whole spirit of the constitution. One of its chief purposes is to protect those rights of property which all our constitutions so carefully guard.

Art. 4, sec. 43, forbids the passing of bills of attainder, *ex post facto* laws, or laws impairing the obligation of contracts.

Art. 18, sec. 14, forbids the taking of the property of any person for public use without just compensation therefor.

Sec. 1 of Art. 15, must be construed in harmony with these sections.

A careful reading shows that it confers no power to amend, alter, or repeal the contract provisions of the act of 1857, especially its 20th section.

It authorizes corporations to be formed *under general laws*, and forbids their creation by special act, except for municipal purposes. It adds, "All laws passed pursuant to *this section* may be amended, altered, or repealed." What laws,

then, may be "passed pursuant to this section"? Obviously, general laws under which corporations may be formed, or special acts for municipal purposes. But the act of 14th February, 1857, is neither a general law forming a corporation nor a special act for municipal purposes. Therefore, it is not a law "passed pursuant to this section," and hence, is not a law which may be "amended, altered, or repealed," pursuant to this section.

4. This court has repeatedly sustained the legislative power to change a contract, but only, as we think, subject to these limitations:

1st. Where the power to amend, alter, or repeal existed, either by prior enactment, or by insertion in the law making the contract, whereby it became part of the contract, so that its exercise was not in violation, but in pursuance of, the contract. Otherwise, the reserved power could only be upheld in face of the constitutional inhibition.

2d. Where the exercise of the power does not destroy or impair rights of property, either of stockholders or of third persons, that have become vested in the legitimate exercise of the chartered powers.

The legislature may change the organization of a corporation, or impose new duties within its proper sphere, or alter its methods of procedure, or even withdraw its franchises, and so cut off its source of income; and these changes may incidentally inflict great loss on the stockholders. But it cannot take away or divert one cent of the accumulations or other property of the corporation. Neither can it impair contracts made, or rights acquired, by third persons, in its legitimate operations.

These limitations have been expressly recognized by this court in the most recent cases, which are all that need be cited.

In Tomlinson *v.* Jessup, 15 Wall., 454, where South Carolina had, by a previous law, expressly declared that the power to amend, alter, or repeal a grant or modification of a charter thereafter made, *should become part of the charter*, it was held that the State might subject to taxation

a railway company to which exemption therefrom had been granted. But Mr. Justice Field not only admits that the legislative right to repeal the exemption was part of the original contract in the grant of the charter, but he expressly limits it to the relation between the State and the corporation, placing under legislative control, rights, privileges, &c., derived by its charter directly from the State; and he expressly excludes from its operation, rights acquired by third parties which have become vested under the charter in the legitimate exercise of its powers. His language is:

"The reservation affects the entire relation between the State and the corporation, and places under legislative control *all rights, privileges, and immunities derived by its charter directly from the State.* Rights acquired by third parties, and which have become vested under the charter in the legitimate exercise of its powers, stand upona different footing. * * * The State only asserts, in the present case, the power under the reservation to modify its own contract with the corporators; it does not contend for a power to revoke the contracts of the corporation with other parties, or to impair any vested rights thereby acquired."

In Miller *v.* The State, *Ibid.*, 478, where the charter granted to a railway company had been altered by the State of New York so as to change the relative proportion of directors to the amount of stock held, the alteration was sustained on the ground that it was within the reservation of power contained in the general law under which the company was organized, which was, of course, part of the contract. But Mr. Justice Clifford says:

"Power to legislate, founded upon such a reservation in a charter to a private corporation, is certainly not without limit, *and it may well be admitted that it cannot be exercised to take away or destroy rights, acquired by virtue of such a charter, and which by a l gitimate use of the powers granted, have become vested in the corporation;* but it may be safely affirmed that the reserved power may be exercised, and to almost any extent, to carry into effect the original purposes of the grant, or to secure the due administration of its affairs, so as to protect the rights of the stockholders and of creditors,

and for the proper disposition of the assets. Such a reservation, it is held, will not warrant the legislature in passing laws to change the control of an institution from one religious sect to another, *or to divert the funds of the donors to any new use, inconsistent with the intent and purposes of the charter.*"

In the dissenting opinion of Justices Bradley and Field, Justice Bradley says, (p. 499:)

"Whilst the legislature may reserve the right to revoke or change its own grant of chartered rights, it cannot reserve a right to invalidate contracts between third parties; as that would enable it to reserve the right to impair the validity of all contracts, and thus evade the inhibition of the constitution of the United States."

In Holyoke Company *v.* Lyman, (*Ibid*, 522,) the same limitations are conceded.

The true extent of the reserved power is accurately defined in Commonwealth *v.* Essex Company, 13 Gray, 239:

"When, under power in a charter, rights have been acquired and become vested, no amendment of the charter *can take away the property or rights which have become vested under the legitimate exercise of the powers granted.*" (See also Durfee *v.* Old Colony Railroad, 5 Allen, 230, 240, 247; Roxbury *v.* Boston and Prov. Railroad, 6 Cush., 424.)

The right reserved by Michigan to amend, alter, or repeal, cannot, then, protect the taxes imposed on the granted lands, because—

1st. The contract which exempts the lands from taxation in the railway company's hands, is not a contract under the general law by which the corporation was formed, nor under any law pursuant to it, or pursuant to the constitution which authorized it, and, therefore, is not a contract under the company's charter.

It is a contract made, after the company's organization, in relation to a gift by Congress, *i. e.*, in relation to property acquired, not in the exercise of the granted franchises, but independently of them.

It is a contract made by the State as trustee for Congress,

and for its beneficiaries, the company, to secure certain advantages, out of the granted property, to the nation, the State, and the company, not at all within the scope of any general law for the creation of corporations, or any law passed pursuant to the constitutional authority.

It is no more a contract within the invasive reach of the reserved power, than any contract which the company might make to purchase land for its line, or depots, or rails, or motive power. And the State has no more power to break it than would the persons from whom the company purchased these necessaries.

The State, accepting the office of trustee, in "disposing of" the lands to the company, sees fit to attach certain conditions to the grant, one of which is, that in consideration of the grant, the company shall pay a heavier specific tax than the general law imposes, but it shall pay no other taxes, which condition, with its annexed promise, the company accepts. Wherein has this contract any possible relation to the "rights, privileges, or immunities derived by the charter from the State," (*vide* Tomlinson *v.* Jessup,) upon which the reserved right to amend, alter, or repeal can attach?

The State may amend the general railroad law, and impose other duties on the company not originally imposed, or limit its franchises, or change its organization, or interfere with its rate of charges, or even destroy its existence; but whilst it exists, or after its death, the State cannot, under the claim of a reserved power, diminish or divert the property which, as trustee of congress, she accepted and disposed of on the condition that it should be "exclusively applied to the construction of the railroad, and to no other purpose whatsoever." Nor can she, without consent, change that other condition, that the heavier present and prospective specific taxes imposed, should be "in lieu of all other taxes."

2. The taxes imposed on the granted lands, thus directly take away part, and subject to the danger of loss, all of the property so conferred on the company by Congress, and are,

therefore, an invasion of the rights of property, which, the cases cited, declare, is not permitted under the reserved power, even as against the stockholders.

3. These taxes also impair the rights of third parties, to wit, the bond-holding creditors of the company, and, therefore, under the conceded limitations, are not protected by the reserved power.

It will not be pretended that the creditors, who have advanced money to the company on the security of the granted lands, have derived their right to have the lands "applied exclusively" to the repayment of that money, from its charter, or from any general law for the formation of corporations, under article 15, section 1. After the company had been organized, the grant made and accepted, and after the State had authorized the company, on the conditions stipulated, to make the lands "exclusively" available for constructing the road, the creditors, on the faith of those conditions, accepted the lands as security. We submit that, even though the State may extinguish our company, she cannot touch the funds which she authorized us to pledge to our creditors. This is the precise exception to the exercise of the reserved power conceded in the cases cited.

TAXATION A SUBSTANTIAL BREACH OF TRUST AND CONTRACT.

If any one of the first four points (and, in connection with the third and fourth, the fifth) be well taken, it follows that the State's right to tax never attached.

We do not, therefore, seek to limit, restrain, or defeat an existing power of State taxation, for it does not yet exist.

Hence we do not combat or encounter the principle stated by C. J. Taney, in Railroad Co. *v.* Maryland, 10 How., 393, that the power to tax is never presumed to be relinquished, unless the intention to relinquish is declared in clear and unambiguous terms. The State cannot relinquish what it never possessed. And we concede its sovereign and far-reaching power over property and busi-

ness within the State's limits, as stated by Mr. Justice Strong, in Railroad Co. *v.* Penistan, 18 Wall., 5. But if our propositions be true, these lands are still within the exception he makes to the reach of that power.

The question, then, is not of limitation or relinquishment of the power any more than if it were a question of power to tax a national fortress or the territory of another State. It is not a question of the State's duty to surrender what she has, but of her power to invade what she has not. And no presumption can be invoked against us that she has such power.

When the State, in 1857, accepted the trust and made the contract, she was dealing with property of the nation. She could not have taxed it then. Her power over it was limited by the terms of the trust. She could do what Congress had authorized; no more. Congress did not authorize taxation, but forbade it by explicitly appropriating the lands to one exclusive purpose.

The State's power, then, is to be found in the terms of the trust only. Necessarily, no implication of power can arise which is inconsistent with those terms. But the power of taxing the trust lands is inconsistent with the terms of the trust until it is completely executed, and the trust relation has ceased.

For "the power to tax implies the power to destroy;" and this no trustee, not even a State, can have. If the State can tax ten mills per acre, she can tax ten dollars per acre, and this would defeat the purpose of the trust. Or, if she can tax at all, the right attends to sell for non-payment of the tax, as we have seen, and this also would defeat the purpose of the trust.

Diminution by taxation, even without sale for non-payment, is as much a breach of a constitutional prohibition as any other form of spoliation. It is not the amount diverted, but the sanctity of the fund, at which the court looks. No consideration of duty to contribute to the State's support, or of the relative insignificance of the diminution, will surmount or evade the protecting bar-

rier. Thus, taxation of judicial salaries, protected from diminution by the constitution during continuance in office, has been held a diminution within the meaning of the clause, and so, void. (Commonwealth *v.* Mann, 5 Watts. & Serg., 403; Opin. Atty. Gen. Hoar, 13 Opin., 161; Protest of C. J. Taney to Sec. of Treasury, 1862; and see Coll. *v.* Day, 11 Wall., 533.)

So, taxes in excess of lawful authority, no matter how slight the excess, have been held void. (Cooley Con. Lim., 520, and cases.)

The State must be judged by the well settled rules which hold trustees to the faithful and perfect execution of the trust duties, and forbid the trustee using or abusing the trust fund for his own profit.

In truth, the surest and speediest road to profit for the State is to execute the trust faithfully. When it is completed, and when, by that completion, the lands have passed into other hands, or have done their perfect work of paying the cost of the railroad, she may tax them unembarrassed by trust or contract. To tax them separately, in addition to the specific tax, is to impose a double and unequal burden.

This premature taxation is so ungracious and inequitable, that nothing but the strictest rules of law can maintain it. So far from having the aid of presumptions, all presumptions ought to repel it.

When the grant was made, in 1857, the country, now opened by this railroad, was mostly a wilderness, without local organization or inhabitants. The public lands were without value or market. The counties of Clare and Osceola were not organized until after 1864. The census returns show that, in 1870, the population of Clare was 366, and that of Osceola 2093. In 1871 the railroad was constructed through those counties. In 1874 the population of Clare was 1354, and that of Osceola, 6,216. The whole grant was from Grand Haven and Pere Marquette to Flint, through territory now embraced in the counties of Genesee, Saginaw, Midland, Isabella, Clare, Osceola, Lake, and

Mason. In 1860, three years after the grant, the population of these counties was 38,423, of which Genesee and Saginaw counties (whence the road started) contained 35,365, leaving, as the population of the territory, now embraced in the six other counties to be penetrated by the railroad, 3,058, in a distance of 138 miles. In 1870, when the railroad had penetrated 63 miles of this wilderness, the population of these six counties had increased to 10,668, and in 1874, when it reached Ludington, the whole distance, it had grown to 26,109.

These facts prove that whilst the road has thus stimulated emigration, and conferred great benefits on the State and nation, it has not yet developed the resources needful for its present support, and that it cannot sustain the added burden of taxation on its lands. They prove that this taxation must, inevitably, impair, and, in time, destroy the market value of the bonds, whose credit depends, not on the earnings of the road, but on the amount which careful and judicious management may realize out of the sale of the lands by the complainants.

The company might have arrested its work in 1862, on the construction of the road from the East Saginaw to Flint, a distance of 33 miles, through the more populous and developed counties of Saginaw and Genesee, and so have earned the proportion of lands attached thereto, without incurring the risk and labor which attended its venture into the wilderness. But it chose, in good faith to the nation and the State, to prosecute the whole work, on the assurance that it would secure the requisite credit by the pledge of the whole of the granted lands. We insist that all the presumptions of law and equity should aid in enforcing a like good faith in the State, whose *cestui que trust* it is.

Exemption from Taxation for Three Years, under Act of April 18, 1871.

Point VI.

Section 37 of the act of April 18, 1871, in imposing a specific annual tax on gross receipts, contained a grant and promise to the land-grant companies, that no lands granted to them which were opposite to, and coterminous with, the constructed portion of their roads, should be subject to local taxation until after the expiration of three years from April 21, 1871; and the lands in Osceola county, now in question, not having been, when assessed, opposite to, and coterminous with, the constructed portions of our railway for three years from April 1, 1871, the taxation, in 1873, was a breach of the obligation of that contract, and, therefore, void.

For the 37th section of the act of April 18, 1871, see *supra*, p. 13, and Appendix of Federal and State Legislation, pp. 33–34.

This section, after imposing an annual tax on gross receipts, declares it in lieu of all other taxes on the property of the company, whether real, personal, or mixed, except penalties, and "except real property not necessary for carrying on the ordinary operations or franchises of their road." Then, the first proviso subjects to local taxation only such granted lands as are, or may be, opposite to, and coterminous with, the constructed portions of roads; and the second proviso still further limits such taxation, by exempting therefrom such lands, so opposite to, and coterminous with, the constructed portions of roads, until three years from April 1, 1871. In other words, lands opposite to, and coterminous with, the constructed portions of roads were promised exemption *until after April* 1, 1874. But the third proviso removes from this three years' exemption the lands so opposite to, and coterminous with, lines *then in operation*, by subjecting such lands to taxation in two years from April 1, 1871, *i. e.*, after April 1, 1873.

If, then, the line of our road was not constructed and in operation on the 18th of April, 1871, through Osceola county, where the assessed lands lie, those lands were promised exemption until after April 1, 1874.

The bill alleges (Record, p. 6) that the lands listed for taxation were not, in April, 1871, opposite to, and coterminous with, the line of road then in operation, and, under the demurrer, this must be taken as true. But the bill also shows (Record, p. 4) that at least forty miles of the road extending eastwardly from Reed City were not constructed until December, 1871, seven or eight months after the date of the act. Reed City, then the western terminus of the road, is on the westerly side of Osceola county. As little, if any, over twenty of these forty miles are in Osceola county, and this the westerly and last constructed part, it follows that the assessed lands, if this exemption be in the nature of an irrevocable grant, were, by the act of 1871, expressly protected from taxation until after April 1, 1874.

We claim, then, that the exemption in the act of 1871 was an irrevocable grant. It was a contract supported by all the considerations we have before adverted to. The mortgage of 1868 had been executed, and the bonds it secured by these lands were seeking a market, and the road through the lands here assessed was being constructed with the proceeds of these bonds. The vital condition of success in selling the bonds was that the security on the lands should be unimpaired. All men knew that if the lands were exposed to the dangerous and ever-increasing burden of local taxation; committed to the tender mercies of local assessors in a country where population and wealth were yet undeveloped—the bonds could not be sold. Hence the legislature, to secure the great benefits which the railroads would bring, promised investors that the security of the bonds—these lands—should be exempt from taxation until 1st April, 1874. On the faith of that promise the bonds were sold, and the road was constructed, *afterwards*, through the lands now in question.

We insist that to tax them now under the acts of 1873,

in that year, is a breach of this contract to the prejudice of the bondholders, which is within the constitutional inhibition, even if the court should not concur in our view of the main questions in the case.

All the considerations and authorities we have suggested in discussing the third and fourth points, apply with equal force here.

Besides, it is only fair to the Legislature to assume that, in subjecting granted lands to local taxation by the acts of 1873, they did not intend to include the lands exempted by the act of 1871 in question. Nothing in the acts of 1873 repeals, in terms, the clauses of the act of 1871 now in view. The acts of 1873 are general in their scope, and find enough to operate on without seeking out these specially and temporarily exempted lands.

Section 50 of the act of 1871, (p. 24,) whilst reserving the right to alter, amend, or repeal its provisions, expressly protects rights of property of companies from the effect of any such change. If the reserved right to alter, amend, or repeal cannot affect the company's rights of property, how can it affect the rights of property of their creditors acquired in the lawful exercise of the company's franchises? See cases cited to point fifth, *supra.*

Art. 5, sec. 12, of the act of May 1, 1873, (p. 29,) (the latest and most authoritative of the acts of 1873, under which these lands are claimed for taxation,) whilst repealing contravening acts, expressly saves "all rights" "existing" or "acquired" when it takes effect. And the next section (13), in repealing the act of 1871, *inter alia*, declares that "all rights * contracted" by any corporation thereunder, "not inconsistent with the provisions of this act," shall continue in force.

If the exemption till April, 1874, made in April, 1871, be a grant of substantial value to the bondholders and the company, as it certainly is, we submit that it is due to the Legislature to assume that this grant was intended to be saved by these clauses from the sweeping operation of the taxing clause.

If this construction be inadmissible, then, we insist that the clause is void as against these lands.

CONSTITUTION PROHIBITS OTHER THAN SPECIFIC TAXES.

POINT VII.

Under the constitution of Michigan, no other than specific taxes can be collected from railway corporations, and this company, having been subjected to, and paid, such taxes, cannot be subjected to additional local taxes on the lands granted to aid in constructing its railroad.

This point having been fully and ably argued by the original counsel of the appellants, Messrs. Webber and Hughes, in their brief filed in this court, we respectfully refer the court thereto for a complete and satisfactory statement of the reasons in its support.

If the court shall be of opinion that we are right on any of the foregoing points, its consideration will, of course, be needless. Otherwise, we respectfully urge it, as conclusive against the validity of the tax laws of 1873.

J. S. BLACK,
TITIAN J. COFFEY,
Of Counsel for Appellants.

Appendix of Federal & State Legislation

FEDERAL LEGISLATION.

ACT OF JUNE 3, 1856—11 U. S. STATUTES AT LARGE, 21.

AN ACT making a Grant of alternate Sections of the Public Lands, to the State of Michigan, to aid in the Construction of certain Railroads in said State, and for other Purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there be and hereby is granted to the State of Michigan, to aid in the construction of railroads from Little Bay de Noquet to Marquette, and thence to Ontonagon, and from the two last named places to the Wisconsin State line; and also from Amboy, by Hillsdale and Lansing, and from Grand Rapids to some point on or near Traverse Bay; also from Grand Haven and Pere Marquette to Flint, and thence to Port Huron, every alternate section of land designated by odd numbers; for six sections in width on each side of each of said roads; but in case it shall appear that the United States have, when the lines or routes of said roads are definitely fixed, sold any section or any part thereof granted as aforesaid, or that the right of preemption has attached to the same, then it shall be lawful for any agent or agents, to be appointed by the Governor of said State, to select, subject to the approval of the Secretary of the Interior, from the lands of the United States nearest to the tiers of sections above specified, so much land in alternate sections or parts of sections as shall be equal to such lands as the United States have sold or otherwise appropriated, or to which the right of preemption has attached as aforesaid; which lands (thus selected in lieu of those sold, and to which preemption rights have attached as aforesaid, together with the sections and parts of sections designated by odd numbers as aforesaid, and appropriated as aforesaid) shall be held by the State of Michigan for the use and purpose aforesaid: *Provided,* That the lands to be so located shall in no case be further than fifteen miles from the lines of said roads, and selected for, and on account of each of said roads: *Provided further,* That the lands hereby granted shall be exclusively applied in the construction of that road for and on account of which such lands are hereby granted, and shall be disposed of only as the work progresses, and the same shall be applied to no other purpose whatsoever: *And Provided further,* That any and all lands heretofore reserved to the United States by any act of Congress, or in any other manner, by competent authority, for the purpose of aiding in any object of internal improvement, or for any other purpose whatsoever, be and the same are hereby reserved to the United States from the operations of this act, except so far as it may be found necessary to locate the routes of said railroads through such reserved lands, in which case, the right of way only shall be granted, subject to the approval of the President of the United States.

SEC. 2. *And be it further enacted,* That the sections and parts of sections of land which, by such grant, shall remain to the United States, within six miles on each side of each of said roads, shall not

be sold for less than double the minimum price of the public lands when sold; nor shall any of said lands become subject to private entry until the same have been first offered at public sale at the increased price.

SEC. 3. *And be it further enacted*, That the said lands hereby granted to the said State, shall be subject to the disposal of the Legislature thereof, for the purposes aforesaid and no other; and the said railroads shall be and remain public highways for the use of the government of the United States, free from toll or other charge upon the transportation of any property or troops of the United States.

SEC. 4. *And be it further enacted*, That the lands hereby granted to said State shall be disposed of by said State only in manner following, that is to say: That a quantity of land not exceeding one hundred and twenty sections for each of said roads, and included within a continuous length of twenty miles of each of said roads, may be sold; and when the Governor of said State shall certify to the Secretary of the Interior that any twenty continuous miles of any of said roads is completed, then another quantity of land hereby granted, not to exceed one hundred and twenty sections for each of said roads having twenty continuous miles completed as aforesaid, and included within a continuous length of twenty miles of each of such roads may be sold; and so from time to time until said roads are completed; and if any of said roads is not completed within ten years no further sales shall be made, and the lands unsold shall revert to the United States.

SEC. 5. *And be it further enacted*, That the United States mail shall be transported over said roads, under the direction of the Post Office Department, at such price as Congress may, by law, direct: *Provided*, That until such price is fixed by law, the Postmaster General shall have the power to determine the same.

Approved, June 3, 1856.

RESOLUTION OF FEB. 17, 1865—13 U. S. STATUTES AT LARGE, 569.

A RESOLUTION to extend the Time for the Reversion to the United States of the Lands granted by Congress to aid in the Construction of a Railroad from Pere Marquette to Flint, and for the Completion of said Road.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the time specified in the fourth section of the act of congress approved June three, eighteen hundred and fifty-six, entitled "An act making a grant of alternate sections of the public lands to the State of Michigan to aid in the construction of certain railroads in said State, and for other purposes," for the reversion to the United States of the lands granted by said act to aid in the construction of a railroad from Pere Mar-

quette to Flint, and for the completion of said road, be, and the same is hereby, extended for the term of five years.

Approved, February 17, 1865.

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16 U. S. STATUTES AT LARGE, 582.

AN ACT to extend the Time for the Reversion to the United States of the lands granted by Congress to the State of Michigan to aid in the Construction of a Railroad from Pere Marquette to Flint, in said State, and for other Purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the time specified in the fourth section of the act of Congress, approved June third, eighteen hundred and fifty-six, entitled "An act making a grant of alternate sections of the public lands to the State of Michigan to aid in the construction of certain railroads in said State, and for other purposes," for the reversion to the United States of the lands granted by said act to aid in the construction of a railroad from Pere Marquette to Flint, and for the completion of said road, be, and the same is hereby, further extended for the period of five years from and after the passage of this act.

SEC. 2. That the State of Michigan may authorize the sale of sixty sections of the land granted to aid the construction of said railroad from Pere Marquette to Flint, whenever and as often as the Governor of said State shall certify that ten additional miles of said railroad is completed and in running order as a first-class railroad: *Provided*, That said lands authorized to be sold as aforesaid shall include only lands situated opposite to and coterminous with the completed sections: *And Provided*, That in case said railroad shall not be fully completed from Flint to Lake Michigan within the time as extended by this act, all the lands included in said grant to which the right to sell shall not then have attached shall revert to the United States.

Approved March 3, 1871.

STATE LEGISLATION.

AN ACT disposing of certain grants of land made to the State of Michigan for Railroad purposes, by act of Congress approved June third (3), eighteen hundred and fifty-six (1856).

SECTION 1. *The People of the State of Michigan enact*, That the lands, franchises, rights, powers and privileges granted to and conferred upon the State of Michigan, by an act of Congress entitled "An act making a grant of alternate sections of land to the State of Michigan to aid in the construction of certain railroads in said State, and for other purposes, approved June third (3), eighteen hundred and fifty-six (1856), be and the same are hereby accepted with the restrictions, and upon the terms and conditions contained in said act of Congress.

SEC. 2. So much of the aforesaid lands, franchises, rights, powers, and privileges as are or may be granted and conferred, in pursuance of said act of Congress, to aid in the construction of a railroad from Amboy by the way of Hillsdale and Lansing, to some point on or near Traverse Bay, are hereby disposed of, granted to, conferred upon, and vested in the Amboy, Lansing and Traverse Bay Railroad Company; in like manner all the lands, franchises, rights, powers and privileges which are, or may be granted and conferred, in pursuance of said act of Congress, to aid in the construction of a railroad from Grand Haven to Flint, and thence to Port Huron, are hereby vested fully and completely in the Detroit and Milwaukee Railway Company, and in the Port Huron and Milwaukee Railway Company, in the manner following, to wit: So much of said lands as pertain or attach to said route from Grand Haven to Owosso, in the county of Shiawassee, are hereby vested fully and completely in the Detroit and Milwaukee Railway Company, and so much of said lands as pertain or attach to said route from Owosso to Flint and thence to Port Huron, are hereby vested fully and completely in the Port Huron and Milwaukee Railway Company, to aid in the construction of the roads of said companies respectively; in like manner all the lands, franchises, rights, powers and privileges which are or may be granted and conferred, in pursuance of said act of Congress, to aid in the construction of a railroad from Pere Marquette to Flint, and thence to Port Huron, are hereby vested fully and completely in the Flint and Pere Marquette Railway Company, and in the Port Huron and Milwaukee Railway Company, according to the provisions of the act of Congress relating thereto, and the direction of the board of control hereby appointed; in like manner all the lands, franchises, rights, powers and privileges as are or may be granted and conferred, in pursuance of said act of Congress, to aid in the construction of a railroad from Grand Rapids to some point on or near Traverse Bay, are hereby vested fully and completely in the Grand Rapids and Indiana Railroad Company; in like manner all the lands, franchises, rights, powers and privileges which are or may be granted and conferred, in pursuance of said act of Congress, to aid in the construction of a railroad from Marquette to the Wisconsin State line, be and the same are hereby vested fully and completely in the Marquette and State Line Railroad Company; in like manner all the lands, franchises, rights, powers and privileges which are or may be granted and conferred, in pursuance of said act of Congress, to aid in the construction of a railroad from Ontonagon to the Wisconsin State Line, are hereby vested fully and completely in the Ontonagon and State Line Railroad Company; in like manner all the lands, franchises, rights, powers and privileges which are or may be granted and conferred, in pursuance of said act of Congress, to aid in the construction of a railroad from Little Bay de Noquet to Marquette, are hereby vested fully and completely in the Bay de Noquet and Marquette Railroad Company; in like manner all the lands, franchises, rights, powers and privileges

which are or may be granted and conferred in pursuance of said act of Congress to aid in the construction of a railroad from Marquette to Ontonagon, are hereby vested fully and completely in the Marquette and Ontonagon Railway Company. All and each of the several railroad companies mentioned in this section shall be subject to all the conditions, restrictions and obligations imposed upon them by this act as hereinafter provided.

SEC. 3. The lands, franchises, rights, powers and privileges, hereby conferred upon and vested in said railroad companies, or either of them, shall be exclusively applied in the construction of their respective lines of railroad, as above designated, and said lands shall be applied to no other purposes whatsoever; and each and every one of said railroads, when completed, shall, in all respects, and in all its parts, be a first-class railroad; and the rail thereof shall be the "T" or continuous rail.

SEC. 4. Said railroads shall be and forever remain public highways for the use of the government of the United States, free from toll or other charge upon the transportation of any property or troops of the United States; and the United States mail shall be transported over said railroads, under the direction of the Post Office Department, at such price as Congress may by law direct: *Provided*, That until such price is fixed by law, the Postmaster General shall have the power to determine the same.

SEC. 5. Each and every one of said railroad companies is required, by a vote of a majority of the directors thereof, to accept the lands, franchises, rights, powers and privileges hereinbefore conferred, which acceptance shall be embodied in a written instrument, signed by the President, and attested by the secretary and corporate seal of said company; and in such acceptance, each of said companies shall severally assent and agree to the provisions and requirements of this act, which acceptance shall be filed in the office of the Secretary of State of Michigan, within sixty days after the passage of this act.

SEC. 6. It shall be the duty of each of said railroad companies on or before the first day of December next, to locate the line of its railroad, and to make complete maps of said line, and to file copies of such maps in the offices of the Governor and Secretary of State of Michigan; and it shall be the duty of the Governor, after affixing his official signature to the duplicate map of each of said roads, to file them in the department having control of the public lands in the city of Washington; said lines so located shall not be considered absolutely final, further than to fix the limits and boundaries within which said lands may be selected, but said company shall have the right to make alterations thereof when necessary to improve said line: *Provided*, Such alteration shall not materially change or alter such road.

SEC. 7. Each of said companies after the completion of twenty continuous miles of its railroad, and after the Governor shall have certi-

fied to the Secretary of the Interior that such twenty continuous miles of its road are so completed, then and not before, said company may sell sixty sections of land included within any continuous twenty miles of its line of road; and in like manner upon the completion of each other twenty continuous miles, it may sell other sixty sections; and so on from time to time until the whole of its road is completed; and after the full and final completion of the entire length of its road. and the acceptance of the same by the board of control herein provided; then the company may sell the remainder of the lands hereby invested in accordance with the act of Congress aforesaid, and not before; and none of the lands hereby granted to said several companies shall be liable to taxation for seven years from the first day of September next; except such parts and parcels thereof as shall be actually sold by said several companies, pursuant to the provisions of this act, or such as shall be improved.

SEC. 8. For the purpose of securing the construction of the aforesaid railroads, within the time limited and in the manner prescribed in this act, and for the purpose of properly managing and disposing of the lands appropriated to aid in the construction thereof, the Governor of the State of Michigan, together with six commissioners, to be nominated by the Governor and confirmed by the Senate, are hereby constituted a board of control of the same, whose duty it shall be to manage and dispose of such lands in aid of the construction of the aforesaid railroads, in the manner in this act provided, and to do any and all other acts necessary and proper respecting the construction and building of said railroads, which shall be prescribed by law; the Governor shall be ex-officio the president of the said board; the commissioners shall hold their office from the time of their appointment until the fourth (4) of March, eighteen huudred and sixty-one; any vacancies that may occur between the sessions of the Legislature, by death, resignation or otherwise, shall be filled by the Governor until the first meeting of the Legislature after such vacancy shall occur. The commissioners shall receive five dollars a day and necessary expenses, for each day that they shall be actually employed in the duties of their office; the amount of such allowance and expenses shall be apportioned among the different companies in such a manner as the board shall deem equitable, and shall be paid by the several companies from time to time as the board may direct.

SEC. 9. If it shall appear that the lands that have been donated by the act of Congress aforesaid for the construction of said lines of said railroad, cannot be obtained by any or either one of said railroad companies, within the limits of six miles on either side of its railroad line, the Governor shall from time to time appoint agents, upon the nomination of the presidents of the respective companies, to make such selection as may be authorized or granted by Congress for the line thereof; but the compensation of said agents, and the costs, expenses and reasonable charges attendant and occasioned by making such selections shall be paid and borne by the said company: *Provided*,

however, That the compensation of agents shall not exceed five dollars a day besides necessary expenses.

SEC. 10. If it shall further appear that upon any part of any of the aforesaid lines of railroad, the lands have been so far sold or preempted as that there does not remain within any continuous twenty miles of any one of said roads, and within the lateral limits of fifteen miles on either side thereof, the amount of one hundred and twenty sections of land, of which the said company can become possessed according to the provisions of the act of Congress aforesaid, then, and in that case, the agent or agents appointed as aforesaid, may select for the benefit of said company, the complement of the said one hundred and twenty sections, upon any other part of the line of their road: *Provided, however*, That in making such selection they shall be confined to twenty continuous miles: *And Provided, moreover*, That such lands thus selected shall in every such case be not less than six miles nor more than fifteen miles from the line of said road, on either side thereof.

SEC. 11. Should either of said railroad companies fail to accept said lands on the terms of this act, within sixty days, or fail to make the survey and maps by the first day of December next, or fail to construct its entire line of road or any part thereof, in the time and manner required, in such case said board of control shall have the power, and it is hereby made their duty, to declare said lands, so far as they have not been sold in good faith, forfeited to the State, and said board of control are hereby required to confer said lands upon some other competent party, under the general regulations and restrictions of this act.

SEC. 12. All of said railroad companies shall at all times and in all matters, be subject to the laws of this State, and to such rules and regulations as may from time to time be enacted and provided by the Legislature of the State of Michigan, in regard to the management and disposition of the said lands, not inconsistent with the provisions of this act, and the act of Congress making said grant of land to this State, and they shall be entitled to all the immunities and privileges conferred by said laws: *Provided*, That nothing herein contained shall be so construed as to relinquish the right of the State to any specific tax imposed upon any railroad company within this State.

SEC. 13. It shall be the duty of each of said railroad companies to make a regular annual report of the proceedings of said company at the usual time and place of electing officers, exhibiting a detailed statement of the amount of all expenditures, work, liabilities, means, etc., a copy of which shall be filed in the office of the Secretary of State, and such other reports to the board of control as said board shall from time to time require.

SEC. 14. The right of way, not exceeding six rods in breadth, through any of the unimproved lands belonging to the State of Michigan, is hereby granted to each of the aforesaid companies, and it shall

be lawful for the aforesaid board of control, at its discretion and upon such terms as they shall deem proper, to grant to any or either of said railroad companies, the right to enter by its workmen and employees upon any lands of this State so owned or held in trust as aforesaid, for the purpose of procuring earth, gravel or other material necessary for the construction of their respective roads, maintaining, repairing and rebuilding the same; and the board of control may also grant to said railroad companies any lands owned or held in trust by said State, which said railroad companies may need and require for depots, grounds and other structures necessary and proper for the use of and maintenance and operation of their aforesaid railroads, upon such terms as such board of control shall deem reasonable and proper.

SEC. 15. Whenever by the crossing of the several lines of railroad herein provided for, or by their running within less than thirty miles of each other, or from any other cause conflicting interests or claims shall arise between any of the aforesaid companies in the selection of their lands, such conflicting claims shall be settled by the board of control herein provided for, whose decision shall be final in all such cases.

SEC. 16. Said railroad companies shall take said grants of land with the conditions imposed, and incumbrances specified in this act, and shall in no court have any claim or recourse whatever upon the State of Michigan for a misapplication of said grants, or for any of the incumbrances or conditions in this act imposed.

SEC. 17. Said railroad companies shall not issue any railroad shares in the capital stock thereof, as fully paid stock, until the same shall have been thus paid in cash or its equivalent, dollar for dollar; and should any officer of any of said companies issue any such shares, knowing the same to be in violation of the provisions of this section, upon conviction, such officer shall be deemed guilty of a misdemeanor, and shall be fined in any sum not over ten thousand dollars, and be imprisoned at hard labor in the State prison for any length of time not more than ten years, and all such shares of stock, issued in violation of this section, are hereby declared to be fraudulent and void, except it be issued for the purchase of property, materials, or equipments for said railroads.

SEC. 18. The Marquette and State Line railroad company shall have power to purchase the railroad, rights and franchises of the Iron Mountain railroad company, and the railway, rights and franchises of the Iron Mountain railway company, on such terms as may be agreed upon; and on the consummation of such purchases, they shall become possessed thereof to the same extent that they are now possessed by said companies.

SEC. 19. Each and every one of the aforesaid railroad companies shall complete and put in good running order at least twenty continuous miles of its road, during each year from and after the first

day of December next, and shall complete the entire length of its road within seven years from the fifteenth day of November next, except the railroads in the upper peninsula herein named; and as to these, each and every one of them shall complete the first twenty miles of their several roads within three years from the first day of December, 1858, and the entire lines of their several roads within the time above limited. So much of the Amboy, Lansing and Traverse Bay railroad as shall lie between Hillsdale and Lansing, and between Lansing and the point of intersection of said road with the Detroit and Milwaukee railroad, shall be completed, fully and entirely, and put in readiness for a train of cars, on or before the first day of November, eighteen hundred and sixty; and said Amboy, Lansing and Traverse Bay railroad company shall build and finish at least twenty continuous miles of its road each year thereafter, until the whole of its line is completed: *Provided, always*, That the entire length of its road from Amboy to some point on or near Traverse Bay shall be finished by the first day of November, eighteen hundred and sixty-five: *Provided, also*, That said Amboy, Lansing and Traverse Bay railroad company shall locate their depot buildings at Lansing within twenty rods of a line drawn (due) east or west of the "capitol square," situate on section sixteen in the township of Lansing.

SEC. 20. In consideration of the grants of land and other privileges hereby conferred on each of the several railroad companies mentioned and named in section two of this act, the said several railroad companies are hereby required, within sixty days from and after the first day of each and every year, to pay into the treasury of this State, as a specific annual tax, one per cent. upon the cost of the road and its equipments and appurtenances, of whatever kind; and it shall be lawful for the legislature of this State, in their discretion, after ten years, to impose upon either or each of said railroad companies the payment of a further tax upon the gross or total earnings of such road of not exceeding two per cent.; which said above several taxes shall be in lieu of all other taxes to be imposed within this State: *Provided*, That the provisions of this section shall not apply to railroad companies in the upper peninsula of this State until after ten years from the passage of this act: *Provided, also*, That the aforesaid additional tax of two per cent. shall be imposed upon the Detroit and Milwaukee railway company, and the Port Huron and Milwaukee railway company, only in proportion to the amount of land which they shall respectively receive in comparison with the quantity of lands received by the other railroad companies; which proportion shall be settled by the board of control.

SEC. 21. All the roads constructed under the provisions of this act shall be the same breadth of gauge with the Central and Southern railroads of this State, except the railroads in the upper peninsula.

SEC 22. All companies operating roads under the provisions of this act shall keep and maintain all their principal offices within this State.

This act is ordered to take immediate effect.

Approved February 14, 1857.

AN ACT to amend an act entitled "an act disposing of certain grants of land made to the State of Michigan for railroad purposes by act of Congress, approved June third, eighteen hundred and fifty-six," approved February 14, A. D. 1857.

SECTION 1. *The people of the State of Michigan enact,* That section nineteen of an act entitled "an act disposing of certain grants of land made to the State of Michigan for railroad purposes by act of Congress, approved June third, one thousand eight hundred and fifty-six," approved February 14, A. D. 1857, be amended by striking out the word "next" where it first occurs in said section, and inserting in place thereof the words "one thousand eight hundred and fifty-eight;" also, by striking out the words "fifty-nine" in the fifteenth line of said section and insert in the place thereof the word "sixty," so that said section as amended shall read as follows:

SEC. 19. Each and every one of the aforesaid railroad companies shall complete and put in good running order at least twenty continuous miles of its road during each year from and after the first day December, one thousand eight hundred and fifty-eight, and shall complete the entire length of its road within seven years from the fifteenth day of November next, except the railroads in the Upper Peninsula herein named; and as to these, each and every one of them shall complete the first twenty miles of their several roads within three years from the first day of December next, and the entire lines of their several roads within the time above limited. So much of the Amboy, Lansing and Traverse Bay railroad as shall lie between Hillsdale and Lansing, and between Lansing and the point of intersection of said road with the Detroit and Milwaukee railroad, shall be completed, fully and entirely, and put in readiness for a train of cars, on or before the first day of November, eighteen hundred and sixty, and said Amboy, Lansing and Traverse Bay railroad company shall build and finish at least twenty continuous miles of its road each year thereafter, until the whole of its line is completed: *Provided always,* That the entire length of its road from Amboy to some point on or near Traverse Bay shall be finished by the first day of November, eighteen hundred and sixty-five: *Provided, also,* That said Amboy, Lansing and Traverse Bay railroad company shall locate their depot buildings at Lansing within twenty rods of a line drawn east or west of the capitol square, situated on section sixteen in the township of Lansing.

SEC. 2. This act shall take immediate effect.

Approved February 3, 1858.

AN ACT to amend an act entitled "an act disposing of certain grants of lands made to the State of Michigan for railroad purposes, approved June 3, 1856," approved February 14, 1857.

SECTION 1. *The People of the State of Michigan enact*, That section seven of an act disposing of certain grants of land made to the State of Michigan for railroad purposes, approved June 3, 1856, approved February 14, 1857, be and the same is hereby amended by striking out the word "sixty," wherever it occurs in said section, and inserting in lieu thereof the words "one hundred and twenty," so that said section, as amended, shall read as follows:

SEC. 7. Each of said companies, after the completion of twenty continuous miles of its railroad, and after the Governor shall have certified to the Secretary of the Interior that such twenty continuous miles of its road are completed, then, and not before, said company shall sell one hundred and twenty sections of the land included within any continuous twenty miles of its line of road, and in like manner, upon the completion of each other continuous twenty miles, it may sell other one hundred and twenty sections, and so on from time to time until the whole of its road is completed; and after the full and final completion of the entire length of its road, and the acceptance of the same by the board of control herein provided, then the company may sell the remainder of the lands hereby invested in accordance with the act of Congress aforesaid, and not before; and none of the lands hereby granted to said several companies shall be liable to taxation for seven years from the first day of September next, except such parts and parcels thereof as shall be actually sold by said several companies, pursuant to the provisions of this act, or such as shall be improved.

SEC. 2. Said companies shall be subject to the same rate of taxation only, and in the same manner as provided in section forty-five of "an act to provide for the incorporation of railroad companies," approved February 12, 1855.

SEC. 3. All acts and parts of acts contravening the provisions of this act are hereby repealed, except an act entitled an act for the relief of certain railroad companies in the Upper Peninsula, approved February 17, 1857.

SEC. 4. This act shall take effect immediately.

Approved February 14, 1859.

AN ACT to repeal section twenty of an act disposing of certain lands for railroad purposes, approved February fourteenth, eighteen hundred and fifty-seven.

SECTION 1. *The People of the State of Michigan enact*, That the twentieth section of an act of the Legislature of Michigan, entitled "An act disposing of certain grants of land made to the State of

Michigan for railroad purposes, by act of Congress approved June third, eighteen hundred and fifty-six," approved February fourteenth, eighteen hundred and fifty-seven, be and the same is hereby repealed.

SEC. 2. The time for the completion of the first section of twenty miles of the several railroads in the Upper Peninsula of this State is hereby extended one year from and after the time limited in the original land grant act, approved February fourteenth, eighteen hundred and fifty-seven.

SEC. 3. This act is ordered to take immediate effect.

Approved February 15, 1859.

AN ACT to amend an act entitled "an act disposing of certain grants of land made to the State of Michigan, for railroad purposes, by act of Congress, approved June third, eighteen hundred and fifty six," approved February fourteenth, eighteen hundred and fifty-seven.

SECTION 1. *The People of the State of Michigan enact*, That section nineteen of the act entitled "an act disposing of certain grants of land made to the State of Michigan for railroad purposes, by an act of Congress, approved June third, eighteen hundred and fifty-six," approved February fourteenth, eighteen hundred and fifty-seven, be and the same is hereby amended so as to read as follows :

SEC. 19. Each and every one of the aforesaid railroad companies shall complete and put in good running order at least twenty continuous miles of its road by the first of January, in the year eighteen hundred and sixty-two, except that the roads in the Upper Peninsula of this State shall not be obliged to complete said twenty miles until January first, eighteen hundred and sixty-three, and shall put in good running order at least twenty continuous miles of its roads by the first day of January in each of the years eighteen hundred and sixty-three and eighteen hundred and sixty-four, except that the roads in the Upper Peninsula shall be entitled to one year longer in each instance for such construction and completion, and shall complete the entire length of its road within the time specified by an act of Congress entitled "an act making a grant of alternate sections of public lands to the State of Michigan, to aid in the construction of certain railroads in said State, and for other purposes," approved June third, one thousand eight hundred and fifty-six : *Provided*, That the Amboy, Lansing and Traverse Bay railroad company shall locate their depot buildings at Lansing within twenty rods of a line drawn east or west from the capitol square, situated on section sixteen, in the township of Lansing.

SEC. 2. All acts and parts of acts in any manner contravening the provisions of this act are hereby repealed.

Approved February 12, 1861.

AN ACT to amend an act entitled "an act disposing of certain grants of land made to the State of Michigan for railroad purposes, by act of Congress, approved June third, eighteen hundred and fifty-six," approved February fourteenth, eighteen hundred and fifty-seven.

SECTION 1. *The People of the State of Michigan enact*, That section seven of "an act disposing of certain grants of land made to the State of Michigan for railroad purposes, by act of Congress, approved June third, eighteen hundred and fifty-six," approved February fourteenth, eighteen hundred and fifty-seven, be and the same is hereby amended so as to read as follows :

SEC. 7. Each of said companies, after the completion of twenty continuous miles of its railroad, and after the Governor shall have certified to the Secretary of the Interior that such continuous twenty miles of its road has been completed, then, and in such case, and not before, said company may sell one hundred and twenty sections of the land included within any twenty continuous miles of its line of road ; and after the said twenty miles of its railroad shall have been so completed and certified to by the Governor, each of said companies may sell another quantity of land, not exceeding one hundred and twenty sections, and included in a continuous length of twenty continuous miles of its road ; and when the Governor of said State shall certify to the Secretary of the Interior that any further twenty continuous miles of any of said roads is completed, then another quantity of said land, not exceeding one hundred and twenty sections, and included within a continuous length of twenty miles of such road may be sold; and so, from time to time, until the whole of its road is completed : *Provided*, That the Amboy, Lansing and Traverse Bay railroad company shall not be entitled to the second one hundred and twenty sections of land until it shall have constructed its road and opened it for use from Owosso to Michigan Avenue, in the city of Lansing : *And provided*, That neither the Flint and Pere Marquette railway company, or the Grand Rapids and Indiana railroad company, shall be entitled to the said second one hundred and twenty sections of land until they shall have respectively constructed and opened for traffic at least thirty two miles of their road on the line to which the grant of land shall respectively attach ; and when the Governor of the State shall certify that either of said companies has complied with the above provisions, such companies shall be entitled thereafter to said lands, as above specified.

Approved March 11, 1861.

AN ACT relative to the conferring and forfeiting certain land grants made by the State of Michigan, by "an act disposing of certain grants of land made to the State of Michigan for railroad purposes, by act of Congress, approved June third, eighteen hundred and fifty six," approved February fourteenth, eighteen hundred and fifty-seven, and the acts amendatory thereto.

SECTION 1. *The People of the State of Michigan enact*, That such of the railroad companies mentioned in an act entitled "an act disposing of certain grants of land made to the State of Michigan for railroad purposes, by act of Congress, approved June third, eighteen hundred and fifty-six," approved February fourteenth, eighteen hundred and fifty-seven, as have finished and put in running order twenty miles of their railroad, shall have all the time to finish said roads, and all the powers, rights and privileges relating to each of said roads respectively, as are mentioned in said act of Congress, and shall be entitled to take and sell the lands donated for the use of each of said roads respectively by said act of Congress, at such times, and in such quantities, and under such restrictions as are in said act mentioned; and all forfeitures of charter, franchise and land grants, incurred by such railroad companies as shall have finished twenty miles of their road, as aforesaid, under any laws of this State, are hereby waived. The Amboy, Lansing and Traverse Bay railroad company shall, within six months from the passage of this bill, finish and open their road for use to Michigan avenue, in the city of Lansing; and shall also, in good faith, commence their work on the said road from Owosso to Saginaw city, by the first day of June, eighteen and sixty-three, and shall finish the said road from Owosso to Saginaw city by the first day of January, eighteen hundred and sixty-five. But nothing herein contained shall be construed to extend the time, or grant any other or further privileges than those now existing by law, to any company who shall not have heretofore constructed twenty miles of their railroad: *Provided*, That the Amboy, Lansing and Traverse Bay railroad company shall not be entitled to that portion of the second one hundred and twenty sections of said land not already conveyed by them, until the said company shall have constructed its road, and opened it for use, to Michigan avenue, in the City of Lansing.

Approved March 19, 1863.

AN ACT to amend an act entitled "an act disposing of certain grants of land made to the State of Michigan for railroad purposes," by act of Congress, approved June third, eighteen hundred and fifty-six, approved February fourteenth, eighteen hundred and fifty-seven.

SECTION 1. *The People of the State of Michigan enact*, That section twenty-one, of the act entitled "an act disposing of certain grants of land to the State of Michigan for railroad purposes," by an act of Congress approved June third, eighteen hundred and fifty-six, approved February fourteenth, eighteen hundred and fifty-seven, be and the same is hereby so amended as to read as follows:

SEC. 21. All the roads constructed under the provisions of this act shall be the same breadth of gauge with the central and southern railroads of this State, except the railroads of the Upper Peninsula; and the said Flint and Pere Marquette railway company shall construct and complete its road from the city of Flint to Pere Marquette,

within five years from the first day of June, eighteen hundred and sixty-six; and the said last named company shall have the rights and privileges, and may dispose of the lands granted to aid in the construction of its road, and shall construct the whole line of its road, under and subject to the restrictions, conditions and regulations prescribed and set forth in and by said act of Congress donating said lands, and the resolution of Congress relating thereto, approved February seventeenth, eighteen hundred and sixty-five, and in and by the said act of the legislature of this State, approved February fourteenth, eighteen hundred and fifty-seven, and the acts amendatory thereof.

Approved March 21, 1865.

JOINT RESOLUTION requesting the Representatives from this State in Congress to urge the passage by Congress of a bill now pending therein, to extend the time for the completion of the Flint and Pere Marquette Railway.

Whereas, There is now pending in Congress a bill (being Senate bill number five hundred and seventy-four, of the second session of the Forty-first Congress), which has passed the Senate of the United States in the following words, viz:

"A bill to extend the time for the reversion to the United States of the lands granted by Congress to the State of Michigan, to aid in the construction of a railroad from Pere Marquette to Flint, in said State, and for other purposes.

"*Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled*, That the time specified in the fourth section of the act of Congress, approved June third, eighteen hundred and fifty-six, entitled 'An act making a grant of alternate sections of the public lands to the State of Michigan, to aid in the construction of certain railroads in said State, and for other purposes,' for the reversion to the United States of the lands granted by said act to aid in the construction of a railroad from Pere Marquette to Flint, and for the completion of said road, be and the same is hereby further extended for the period of five years from and after the passage of this act.

"SEC. 2. *And be it further enacted*, That the State of Michigan may authorize the sale of sixty sections of the land granted to aid the construction of said railroad from Pere Marquette to Flint, whenever and as often as the Governor of said State shall certify that ten additional miles of said railroad is completed and in running order as a first-class railroad: *Provided*, That said lands authorized to be sold as aforesaid shall include only lands situate opposite to and coterminous with the completed sections: *And Provided*, That in case said railroad shall not be fully completed from Flint to Lake Michigan within the time as extended by this act, all the lands included

in said grant, to which the right to sell shall not then have attached, shall revert to the United States ;"

And whereas, The time now limited for the completion of said road will expire on the third day of June, eighteen hundred and seventy-one, unless renewed and extended by Congress ; therefore, be it

Resolved by the Senate and House of Representatives of the State of Michigan, That the Representatives in Congress from this State be and they are hereby respectfully requested to use their influence to procure the passage of said pending bill at this present session of Congress.

Resolved, That his Excellency the Governor be requested to transmit copies of the foregoing preamble and resolution to each of our Representatives in Congress.

Approved February 16, 1871.

EXTRACTS FROM THE CONSTITUTION OF MICHIGAN.—ARTICLE XIV.

SECTION 1. All specific State taxes, except those received from the mining companies of the Upper Peninsula, shall be applied in paying the interest upon the Primary School, University, and other educational funds, and the interest and principal of the State debt, in the order herein recited, until the extinguishment of the State debt, other than the amounts due to educational funds, when such specific taxes shall be added to and constitute a part of the Primary School Interest Fund. The Legislature shall provide for an annual tax, sufficient, with other resources, to pay the estimated expenses of the State government, the interest of the State debt, and such deficiency as may occur in the resources.

SEC. 10. The State may continue to collect all specific taxes accruing to the Treasury under existing laws. The Legislature may provide for the collection of specific taxes from banking, railroad, plank road, and other corporations hereafter created.

SEC. 11. The Legislature shall provide an uniform rule of taxation, except on property paying specific taxes, and taxes shall be levied on such property as shall be prescribed by law.

SEC. 12. All assessments hereafter authorized shall be on property at its cash value.

SEC. 13. The Legislature shall provide for an equalization by a State Board, in the year one thousand eight hundred and fifty-one, and every fifth year thereafter, of assessments on all taxable property, except that paying specific taxes.

ARTICLE XV.

SECTION 1. Corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes. All laws passed pursuant to this section may be amended, altered, or repealed. But the Legislature may, by a vote of two-thirds of the members elected to each House, create a single bank, with branches.

SEC. 7. The stockholders of all corporations and joint stock associations shall be individually liable for all labor performed for such corporation or association.

SEC. 10. No corporation, except for municipal purposes, or for the construction of railroads, plank roads, and canals, shall be created for a longer time than thirty years.

GENERAL RAILROAD LAW OF 1855.

[Laws of 1855, page 153.]

Sections 1 to 10, inclusive, provide for the incorporation and organization of railroad companies.

Section 11 makes stock personal estate, and directs the mode of its transfer.

SEC. 12. All the stockholders of any such company shall be severally individually liable to the creditors of said company, to an amount equal to the amount of stock held by them respectively, for all debts and contracts made by such company, until the whole amount of stock held by him shall have been paid in, and a certificate thereof have been made and recorded, as prescribed in the following section; but all the stockholders of any such company shall be individually liable for all labor performed for such company, but shall not be liable to an action therefor before an execution shall be returned unsatisfied in whole or in part against the corporation; and the amount due on such execution shall be the amount recoverable, with costs, against any such stockholder; and every such stockholder against whom any such recovery for such labor shall have been had, shall have a right to recover the same of the other stockholders in said corporation, in rateable proportion to the amount of the stock they shall respectively hold with himself.

Section 13 provides for certificates of stock.

Section 14 prescribes a penalty against declaring dividends when company is insolvent.

Section 15 makes officers liable for false certificates, reports and public notices.

Section 16 requires the filing of a map of the route.

SEC. 17. Every such corporation shall possess the general powers, and be subject to the liabilities and restrictions following, that is to say:

* * * * * * * * * *

2. To receive, hold and take, such voluntary grants and donations of real estate and other property, as shall be made to it, to aid in the construction, maintenance, and accommodation of such road; but the real estate thus received by voluntary grant, shall be held and used for the purposes of such grant only;

* * * * * * * * * *

7. To take, transport, carry and convey persons and property on their said road, by the force and power of steam, of animals, or any mechanical powers, or by any combination of them, and receive tolls and compensation therefor ;

8. To erect and maintain all necessary and convenient buildings, stations, depots and fixtures, and machinery, for the accommodation and use of their passengers, freight and business, and obtain and hold the lands necessary therefor ;

9. To regulate the time and manner in which passengers and property shall be transported, and the tolls and compensation to be paid therefor ; but such compensation for any passenger and his ordinary baggage, shall not exceed three cents a mile, unless by special act of the Legislature, and shall be subject to alteration as hereinafter provided.

Sections 18 to 26, inclusive, provide for acquiring title to lands.

SEC. 27. All companies organized under this act, (and all other railroad companies,) shall have power from time to time to borrow such sums of money as they may deem necessary for completing and finishing or operating their railroad, and to issue and dispose of their bonds for any amount so borrowed for such sums and at such rate of interest as they may deem advisable, and to mortgage their corporate property and franchises to secure the payment of any debt contracted by the company for the purposes aforesaid ; and the directors of the company may confer on any holder of any bond issued for money borrowed as aforesaid, the right to convert the principal due or owing thereon, into stock of said company at any time, not exceeding twenty years from the date of said bond, under such regulations as the company may see fit to adopt ; and such company may sell their bonds either within or without this State, at such rates and prices as they may deem proper ; and in case the capital stock of any such railroad company is found to be insufficient for constructing or operating its road, or for building a double track, repairs or other improvement to facilitate the transportation of persons and property, such company may, with the concurrence of a majority of its stockholders, by vote at any annual meeting, or special meeting called for that purpose, increase its capital stock to the requisite amount.

Section 28 provides for crossing highways.

Section 29, for changing line.

Section 30, for acquiring public lands.

Section 31 prescribes certain police regulations.

SEC. 32. Every railroad corporation in this State shall make an annual report to the Auditor General, which report shall be verified by the oath of the treasurer, or president and acting superintendent, of the operations of the year ending on the first day of January in each year, and shall state :

1. The capital stock, and the amount actually paid in ;
2. The amount expended for the purchase of lands for the construction of the road, for buildings, and for engines and cars respectively ;
3. The amount and nature of its indebtedness, and the amounts due the corporation ;
4. The amount received for the transportation of passengers, of property, of mails, and from other sources ;
5. The amount of freight—specifying the quantity in tons—of the products of the forest, of animals, of vegetable food, and other agricultural products, manufactures, merchandise, and other articles ;
6. The amount paid for repairs, engines, cars, buildings and salaries ;
7. The number and amount of dividends, and when paid ;
8. The number of engine houses and shops, of engines and cars, and their character ;
9. The number of miles run by passenger, freight, and other trains respectively ;
10. The number of men employed, and their occupation ;
11. The number of persons injured in life or limb, and the cause of such injury ;
12. Whether any accidents have arisen from carelessness or negligence of any person in the employment of the corporation, and whether such person is retained in the service of the corporation.

Section 33 prescribes a penalty for neglect to make report.

SEC. 34. This State shall have a lien upon all railroads therein, and their appurtenances and stock therein, for all penalties, taxes and dues which may accrue to the State from the corporations owning the same, which lien of the State shall take precedence of all demands, judgments or decrees against said corporations ; and each citizen of this State shall have a lien upon all the personal property of said corporations, for all penalties dues and demands against any such corporation, to the amount of one hundred dollars, originally contracted within this State, which, after said lien of the State, shall take precedence of all other debts, demands, judgments or decrees, liens or mortgages, against said corporation.

SEC. 35. The Legislature may, when any railroad organized under this act is opened for use, from time to time alter or reduce the rates of toll, fare, freight, or other profits upon such road ; but the same shall not, without the consent of the corporation, be so reduced as to produce less than fifteen per cent. per annum on the capital actually paid in ; nor, unless on an examination of the amounts received and expended, to be made by the Auditor General, he shall ascertain that the net income divided by the company from all sources for the year then last past shall have exceeded an annual income of fifteen per cent. upon the capital of the corporation actually paid in.

SEC. 36. Any corporation organized under this law shall, when applied to by the Postmaster General, convey the mails of the United States on their road or roads respectively; and in case such corporation shall not agree to the rates of transportation thereof, and as to time, rate of speed, manner and condition of carrying the same, it shall be lawful for the Governor of this State to appoint three commissioners, who, or a majority of them, after fifteen days notice in writing of the time and place of meeting, to the corporation, shall determine and fix the prices, times and conditions aforesaid; but such prices shall not be less for conveying said mails in the regular passenger trains, than the amount which said corporation would receive as freight on a like weight of merchandize, transported on their merchandize train, and a fair compensation for the postoffice car. And in case the Postmaster General shall require the mail to be carried at other hours and at a higher speed than the passenger trains be run at, the corporation shall furnish an extra train for the mail, and be allowed an extra compensation for the expenses and wear and tear thereof, and for the services to be fixed as aforesaid.

Sections 37 to 44, inclusive, contain police regulations.

SEC. 45. Every corporation formed under the provisions of this act, shall, on or before the first day of July, pay the State Treasurer, an annual tax of one per cent. on the capital stock of said company paid in, which tax shall be in lieu of all other taxes upon the property of said company, whether real, personal, or mixed, except penalties by this act imposed; the said tax shall be estimated upon the last annual report of said corporation, but nothing contained in this section shall apply to any existing corporations.

Section 46 authorizes suits for penalties.

Section 47 provides for forfeiture of incorporation.

Section 48 makes companies common carriers.

Section 49 authorizes aid to and running arrangements with other companies.

Sections 50 to 52, inclusive, provide for consolidation.

Section 53, for construction of road on line common to two companies.

Section 54 to 62, inclusive, contain police regulations.

SEC. 63. All acts the subjects of which are herein re-enacted, or which contravene or are inconsistent with the terms and intention of this act, are hereby repealed.

SEC. 64. This act shall take effect immediately.

Approved February 12, 1855.

General Railroad Law of 1871.

[Laws of 1871, page 328.]

Sections 1 to 6, inclusive, provide for the incorporation and organization of railroad companies.

Sec. 7. The stock of any such company shall be deemed personal estate, and shall be transferable in the manner and under such restrictions and conditions as may be provided for by the by-laws; but any certificate of stock issued before payment in full shall show on its face, or by endorsement, the amount paid thereon, and no share shall be transferred on the books of the company until the same shall be paid in full, without the consent of the board of directors.

Sec. 8. All of the stockholders of any such company shall be individually liable to an amount equal to the amount of stock held by them respectively, for all the labor performed, and also for all ties, wood, and supplies furnished for the company, but they shall not be liable to an action therefor until an execution shall be returned unsatisfied, in whole or in part, against the corporation, and the amount due on each execution shall be *prima facie* evidence of the amount receivable [recoverable], with cost, against any such stockholder; and every stockholder against whom any such recovery for labor shall have been had, shall have the right to recover the same of the other stockholders in said corporation, in ratable proportion to the amount of stock they shall respectively hold.

Section 9 relates to the filing of a map of the route.

Sec. 10. Every such corporation shall possess the general powers, and be subject to the liabilities and restrictions following, that is to say:

* * * * * * * * *

Seventh. To take, transport, carry, and convey persons and property on their said road, by the force and power of steam, animals, or any mechanical power, or by any combination of them, and to receive tolls and compensation therefor;

* * * * * * * * *

Ninth. To regulate the time and manner in which passengers and property shall be transported, and the tolls and compensation to be paid therefor; but such compensation for transporting any passenger, and his or her ordinary baggage, not exceeding in weight one hundred pounds, shall not exceed the following prices, viz: On railroads not exceeding thirty miles in length, for a distance not exceeding five miles, twenty-five cents; for a distance not exceeding thirty miles, three and one-half cents per mile;

Tenth. On all railroads exceeding thirty miles in length, they may charge not exceeding three cents per mile. All railroad companies shall keep their ticket offices, between the hours of seven o'clock A. M. and eleven o'clock P. M., open for the sale of tickets at least thirty minutes previous to the time advertised for the departure of any pas-

senger train: *Provided further*, That the rate charged for the transportation of property shall not exceed the rate which the Michigan Central Railroad Company is by its charter authorized to charge. Any railroad company doing business within this State shall be required to transport without unnecessary delay, and in due order of time, without discrimination, except as to classification, all freight offered for transportation, and at uniform rates per mile: *Provided*, That such railroad company shall be entitled to charge and collect, in addition to their uniform rates per mile, for a distance not more than fifteen miles, one hundred per cent; for a distance not exceeding twenty-five miles, fifty per cent, and for a distance not exceeding fifty miles, twenty-five per cent.

SEC. 11. The Legislature may, when any railroad organized under this act is opened for use, from time to time, alter or reduce the rates of toll, freight, or other profits upon such road; but the same shall not, without the consent of the corporation, be so reduced as to produce less than fifteen per cent per annum on the capital actually paid in; nor, unless on an examination of the amounts received and expended, to be made by the Auditor General, he shall ascertain that the net income divided by the company from all sources for the year then last past shall have exceeded an annual income of fifteen per cent upon the capital of the corporation actually paid in.

Sections 12 to 21, inclusive, relate to proceedings to acquire title to lands.

SEC. 22. All companies organized under this act shall have power, from time to time, to borrow such sums of money as they may deem necessary for completing and finishing, or operating their road, or any part thereof, or for paying indebtedness, and to issue or dispose of their bonds or obligations for any amount so borrowed, for such sums and such rate of interest as they may deem advisable, and to mortgage their corporate property and franchises, and the income thereof, or any part thereof, to secure the payment of any debt contracted, or to defray any expenditure by the company for the purpose aforesaid; and the directors of any such company may confer on any holder of any such bond or obligation, the right to convert the same into the stock of said company, at any time not exceeding ten years from the date of said bond, on such terms and under such regulations as the company may see fit to adopt; and said company may sell their bonds or obligations, either within or without this State, at such rates and prices as they may deem proper. Any such company may, at any time, with the concurrence of a majority in value of its stockholders at any annual meeting, or at any special meeting of the stockholders called for that purpose, increase its capital stock, or provide for the issue of preferred or secured stock, upon such terms and conditions as to them may seem meet.

Section 23 authorizes change of line.

Section 24 provides for acquiring title to public lands.

Sections 25 to 32, inclusive, contain sundry police regulations.

SEC. 33. Every company shall, on or before the first day of May in each year, make and file with the Auditor General a report, which shall be verified by the president and acting superintendent of such company, of its operations for the year ending on the last day of December next previous thereto, and shall state :

First. The capital stock and the amount paid in ;

Second. The amount expended for the purchase of lands, for buildings, and for engines and cars, respectively ;

Third. The amount and nature of its indebtedness, and the amounts due the company ;

Fourth. The amount received for the transportation of passengers, of property, of mails, and from all other sources, including receipts for lands sold ;

Fifth. The amount paid for operating expenses, and ordinary repairs, and construction ;

Sixth. The number and amount of dividends, and when paid ;

Seventh. The number of engine houses, shops, and cars, and their character ;

Eighth. The number of miles of road completed and in operation, and between what points completed, and between what points operated ;

Ninth. The amount of freight transported, specifying the quantity, in tons, of minerals, products of the forest, animals, animal and vegetable food, manufactures, merchandise, and other articles ;

Tenth. The number of miles run by passenger, freight, and other trains, respectively, the number of passengers transported, and the average number of miles of each passenger ;

Eleventh. The width of the gauge of the road.

Section 34 prescribes penalties for neglect to make report.

Section 35 gives the State a general lien for penalties, taxes and dues, and citizens a limited lien for penalties, dues and demands.

Section 36 provides for fencing roads.

SEC. 37. Every company formed under the provisions of this act shall, on or before the first day of July of each year, pay to the State Treasurer, on the statement of the Auditor General, an annual tax on the gross receipts of said company, computed in the following manner, viz : upon the gross receipts to the amount of three thousand dollars (or less) per mile of road regularly operated, one and one-half per cent ; upon the gross receipts in excess of three thousand dollars, and less than six thousand dollars per mile, two per cent ; and upon the gross income equal to or in excess of six thousand dollars per mile, three per cent ; which tax shall be in lieu of all other taxes upon the property of said company, whether real, personal, or mixed, except penalties imposed by law, except real property not necessary for carrying on the ordinary operations or franchises of their road : *Provided*, Only such lands granted to any railroad com-

pany shall be liable to local taxation as are or may be opposite to and coterminous with the constructed portion and portions of said roads respectively: *And provided further*, That no such lands shall be subject to taxation until after the expiration of three years from and after the first day of April, in the year of our Lord one thousand eight hundred and seventy-one, and until after three years from the date of the certificate showing that such lands have been earned by said railroad company, after which time said lands shall be taxed as other lands, except as hereinafter provided: *And provided further*, That the lands of the several land-grant railroad companies, opposite to and coterminous with their lines as now in operation, shall be subject to taxation in two years from said first day of April, in the year of our Lord one thousand eight hundred and seventy-one; and such tax shall be estimated upon the last annual report of said company filed in the office of the Auditor General, as hereinbefore provided: but if such company omits to make a report when due, then the tax shall be estimated upon the best information the Auditor General may obtain: *Provided*, That no corporation formed under the provisions of this act shall be liable to pay tax on any money expended on any portion of its road which has not been opened for use.

Section 38 provides for forfeiture of rights and privileges upon failure to construct road within a limited period.

Section 39 makes railway companies common carriers.

Section 40 authorizes holding stock in other companies, and running arrangements with them.

Sections 41, 42 and 43 provide for consolidation.

Section 44, for construction of line common to two companies.

Sections 45 to 49, inclusive, contain police regulations.

SEC. 50. This act may at any time be altered, amended, or repealed, but such alteration, amendment, or repeal shall not affect the rights of property of companies organized under it; nor shall the dissolution of any such company take away or impair any remedy given for or against such corporation, its stockholders, or officers, for any liability which shall have been previously incurred; and the provisions of this act shall apply to all companies incorporated or existing under the act entitled "An act to provide for the incorporation of railroad companies," approved February twelfth, eighteen hundred and fifty-five, and the several acts amendatory thereof.

Sections 51 to 54, inclusive, relate to tunnel companies.

SEC. 55. All acts and parts of acts contravening any of the provisions of this act are hereby repealed; but all proceedings pending, and all rights and liabilities existing, acquired, or incurred at the time this act takes effect, are hereby saved, and such proceedings may be consummated under and according to the law in force at the time such proceedings were commenced, or they may be abandoned, and

new proceedings taken under this act. Nothing in this section contained shall be construed as in any manner affecting the franchises or privileges heretofore by law granted to the Paw Paw Railroad Company.

Section 56 directs how penalties may be sued for.

SEC. 57. This act shall take immediate effect.
Approved April 18, 1871.

GENERAL RAILROAD LAW OF 1873.

[Laws of 1873, page 496.]

Article I. provides for incorporation.

Article II., sections 1 to 5, inclusive, prescribe details of organization.

Section 6 declares stock personal estate and directs mode of transfer.

Section 7 requires filing of map.

Section 8 authorizes change of route.

SEC. 9. Every such corporation shall possess the general powers, and be subject to the liabilities and restrictions following, that is to say:

* * * * * * * * * *

Second, To receive, hold, and take such voluntary grants and donations of real estate and other property as shall be made to it to aid in the construction, maintenance, and accommodation of such road, but the real estate thus received by voluntary grant shall be held and used for the purposes of such grant only;

* * * * * * * * * *

Seventh, To take, transport, carry, and convey persons and property on their said road by the force and power of steam, animals, or any mechanical power, or by any combination of them, and to receive tolls and compensation therefor;

Eighth, To erect and maintain all necessary and convenient buildings, stations, depots, and fixtures and machinery for the accommodation and use of their passengers, freight, and business, and to obtain and hold all the lands necessary therefor;

Ninth, To regulate the time and manner in which passengers and property shall be transported, and the tolls and compensation to be paid therefor; but such compensation for transporting any passenger, and his or her ordinary baggage, not exceeding in weight one hundred pounds, shall not, except on railroads operating less than twenty miles of road, exceed the following prices, viz: for a distance not exceeding five miles, four cents per mile; for all other distances, not exceeding three cents per mile; and no fare shall be less than five cents, and that amount in any case may be charged and collected: *Provided*, That in the Upper Peninsula, five cents per mile may be

charged and collected on all railroads: *And provided*, That the provisions of this act shall not apply to the Paw Paw railroad.

Seetions 10 to 14, inclusive, relate to duties of companies as carriers.

Sections 15 to 27, inclusive, provide for acquiring title to lands.

Section 28 authorizes the building of spur branches.

Sections 29 and 30 provide for consolidation.

Sections 31, 32 and 33 relate to tunnel companies.

Section 34 authorizes all connecting lines to use tunnels.

Section 35 authorizes construction by one of line common to two companies.

Section 36 relates to crossings and connections.

SEC. 37. It shall be competent and lawful for the trustees, in any deed of trust or mortgage of and upon any railroad, in case of the inability of said company, or its default in the payment of the principal or interest money secured thereby, in pursuance of any power of sale contained therein, to offer the same for sale, according to the power, and in pursuance of its terms, and on such sale to execute a deed of the premises sold, which said deed, duly executed, shall convey the title to the purchaser or purchasers, and authorize them to enter into possession and enjoyment thereof, as fully as may be provided in said mortgage or deed of trust; and it shall be competent and lawful for all railroad companies organized under this act, for the purpose of securing their bonds, authorized to be issued in accordance with its provisions, to execute such mortgage, or deed, with such power contained therein for the sale of the property mortgaged, or deeded, as shall, in its judgment, or the judgment of the board, be found expedient, and such power and sale in accordance therewith shall be lawful and valid.

SEC. 38. All companies organized under this act shall have power from time to time to borrow such sums of money as may be necessary for completing, finishing, equipping, or operating their road, or any part thereof, or for paying any indebtedness necessarily incurred for completing, finishing, or operating their road, or any part thereof; and to issue and dispose of their bonds or obligations for any amount necessarily borrowed for such purpose, for such sums and for such rate of interest, not exceeding ten per cent, as they may deem advisable, and to mortgage their corporate property and franchises and the income thereof, or any part thereof, to secure the payment of any debt contracted or to defray any expenditure by the company for the purpose aforesaid. And the directors of any such company may confer on any holder of any such bond or obligation the right to convert the same into the stock of said company at any time not exceeding ten years from the date of said bonds. on such terms and under such regu-

lations as the company may see fit to adopt: and said company may sell their bonds or obligations, either within or without this State, and at such rates and prices as they may deem proper. Any such company may at any time, with the concurrence of the stockholders representing a majority of the stock, a majority in value of its stockholders, at any annual meeting, or at any special meeting of the stockholders called for that purpose, increase its capital stock, or provide for the issue of preferred or secured stock, for the purpose aforesaid, upon such terms and conditions as to them may seem meet. In case the capital stock of any such company or corporation organized under this act shall be found insufficient for constructing or operating its road, or for building a double track, repairs, or other improvements to facilitate the transportation of persons or property, such corporation may, with the concurrence of two-thirds in value of all its stock, increase its capital stock from time to time to any amount required for the purpose aforesaid; such increase shall be by a vote in person or by proxy of two-thirds in amount of all the stock of such corporation, at a meeting of the stockholders called by the directors of the corporation for such purpose, by giving notice in writing to each stockholder, to be served personally, or by depositing the same in a postoffice, directed to the postoffice address of each of said stockholders severally, with necessary postage for the transmittal of the same prepaid, at least sixty days prior to the day appointed for such meeting, and by advertising the same in some newspaper published in each county through or into which the said road shall run or be intended to run, or if a newspaper shall not be published therein, then such meeting shall be advertised in two newspapers published in the city of Detroit at least sixty days prior to the day appointed for such meeting; and such notice shall state the time and place of the meeting, the object thereof, and the amount to which it is proposed to increase such capital stock, and at such meeting the corporate stock of such corporation may be so increased, by a vote of two-thirds in amount of the corporate stock of such corporation, to an amount not exceeding that mentioned in the notice so given.

Section 39 relates to use of track and station grounds in common, and to the enlargement of the latter.

Section 40 provides for depot accommodations at junctions and joint termini.

ARTICLE III.

SEC. 1. Every company shall, on or before the first day of May in each year, make and file with the Auditor General a report, which shall be verified by the president or vice president and acting superintendent of such company, of its operations for the year ending on the last day of December next previous thereto, and shall state—

First, The capital stock and the amount paid in;

Second, The amount expended for the purchase of lands for buildings, and for engines and cars, respectively;

Third, The amount and nature of its indebtedness, and the amounts due the company;

Fourth, The amount received for the transportation of passengers, of property, of mails, and from all other sources, including receipts for lands sold;

Fifth, The amount paid for operating expenses and ordinary repairs, and construction;

Sixth, The number and amount of dividends, and when paid;

Seventh, The number of engine houses, shops, and cars, and their character;

Eighth, The number of miles of road completed and in operation, and between what points completed, and between what points operated;

Ninth, The amount of freight transported, specifying the quantity in tons, of minerals, products of the forest, animals, animal and vegetable food, manufactures, merchandise, and other articles;

Tenth, The number of miles run by passenger, freight, and other trains, respectively; the number of passengers transported, and the average number of miles of each passenger;

Eleventh, The width of the gauge of the road.

Twelfth, Such other matters as the Auditor General may require.

Section 2 prescribes a penalty for neglect to report and for making false report.

SEC. 3. Every company formed under the provisions of this act shall, on or before the first day of July in each year, pay to the State Treasurer, on the statement of the Auditor General, an annual tax upon the gross receipts of said company, computed in the following manner, viz: Upon all gross receipts not exceeding four thousand dollars in amount per mile of road actually and regularly operated for the conveyance of passengers and freight, two per cent of such gross earnings; upon such gross receipts in excess of four thousand dollars per mile so operated, three per cent thereof; which amount or tax shall be in lieu of all other taxes upon the property of such companies, except such real estate as is owned and can be conveyed by such corporation under the laws of this State and not actually occupied in the exercise of its franchises, and not necessary or in use in the proper operation of its road: but such real estate so excepted shall be liable to taxation in the same manner, for the same purposes, and to the same extent, and subject to the same conditions and limitations as to assessment for taxation, to taxation, and to the collection and return of taxes thereon as is other real estate in the several townships within which the same may be situated. And when a railroad lies partly within and partly without this State, there shall be paid such portion of the tax herein imposed as the length of the operated road lying within this State bears to the whole length of the operated portion thereof.

Section 4 provides for assessment of taxes on leased roads.

Section 5 gives the State a general lien and citizens a limited lien for their respective demands.

Article IV. prescribes police regulations.

ARTICLE V.

SECTION 1. All of the stockholders of any such company shall be individually liable for all the labor performed; but they shall not be liable to an action therefor until an execution shall be returned unsatisfied, in whole or in part, against the corporation, and the amount due on such execution shall be *prima facie* evidence of the amount recoverable with cost against any such stockholder; and every stockholder against whom any such recovery for labor, ties, wood, and supplies shall have been had, shall have the right to recover the same of the other stockholders in said corporation, in ratable proportion to the amount of stock they shall respectively hold.

Section 2 relates to injuries to passengers.

Section 3 prescribes a penalty for declaring dividends when insolvent.

Section 4, for making false report, certificate or public notice.

SEC. 5. Any corporation organized under this act or any former act, shall, when applied to by the Postmaster General, carry the mails of the United States on their road or roads respectively; but the prices shall not be less for carrying said mails in the regular passenger trains than the amount which said corporation would receive as freight on a like weight of merchandise transported on their merchandise train, and a fair compensation for their postoffice car.

Section 6 provides for forfeiture of corporate rights.

Sections 7 and 8 authorize the recovery of damages for death caused by wrongful act.

Section 9 prescribes punishment for issue of fraudulent stock.

Section 10, authorizes suits for penalties.

SEC. 11. This act may at any time be altered, amended, or repealed, but such alteration, amendment, or repeal shall not affect the rights of property of companies organized under it; nor shall the dissolution of any such company take away or impair any remedy given for or against such corporation, its stockholders or officers, for any liability which shall have been previously incurred; and the provisions of this act shall apply to all companies incorporated or existing under the laws of this State, except the Paw Paw railroad company, which shall in no manner be affected by the passage of this act, in respect to the franchises and privileges heretofore granted to said company.

SEC. 12. All acts and parts of acts contravening any of the provisions of this act are hereby repealed; but all proceedings pending, and

all rights and liabilities existing, acquired, or incurred at the time this act takes effect, are hereby saved, and such proceedings may be consummated under and according to the law in force at the time such proceedings were commenced, or they may be abandoned and new proceedings taken under this act.

SEC. 13. The following entitled acts are hereby repealed, viz: "An act to provide for the incorporation of railroads," approved February twelfth, eighteen hundred and fifty-five; "An act supplementary to an act entitled 'An act to provide for the incorporation of railroad companies', approved February twelve, eighteen hundred and fifty-five," approved March twenty, eighteen hundred and sixty-three; "An act supplementary to an act entitled 'An act to provide for the incorporation of railroad companies,' approved February twelfth, eighteen hundred and fifty-five," approved March twenty-seven, eighteen hundred and sixty seven; "An act to compel railroad companies to provide their passenger coaches with aprons between the coaches, for the protection of passengers, and for other purposes," approved March twenty-seven, eighteen hundred and sixty-seven: "An act for the relief of railroads in the Upper Peninsula," approved March twenty-seven, eighteen hundred and sixty-seven; also, "An act to revise the laws providing for the incorporation of railroad companies," approved April eighteen, eighteen hundred and seventy-one; also, all laws amendatory thereto, or in any of the parts thereof in conflict with the provisions of this act; but the organization of all corporations, under the provisions of either of said acts, shall be deemed and taken to be organizations under this act, and all rights, obligations, and liabilities contracted or incurred by any of such corporations thereunder, or under the provisions of any law now in force, not inconsistent with the provisions of this act, shall continue of the same force and effect as though such acts or law had not been repealed; and all such companies, from and after the taking effect of this act, shall be subject to all the provisions hereof as fully as though such organization had been perfected hereunder.

SEC. 14. This act shall take immediate effect.

Approved May 1, 1873.

AN ACT prescribing the duties of the Auditor General in certain cases, and his compensation therefor.

SECTION 1. *The People of the State of Michigan enact*, That it shall be the duty of the Auditor General to obtain from the office of the Secretary of the Interior, a full list of all lands earned and patented by any railroad company of the State under any law granting public lands for the purpose of aiding in the construction of such railroads, which may be liable to taxation, and forward a copy of such lists of said lands to the county treasurer of the proper county in which the same are located, on or before the first day of April in each year.

SEC. 2. The Auditor General shall receive only such compensation for his services as required by section one of this act, as shall be necessary to pay the proper officer at Washington for making and forwarding the lists aforesaid, and the amount so paid shall be audited by the Board of State Auditors, and paid to the Auditor General out of the treasury of the State.

SEC. 3. This act shall take immediate effect.

Approved March 22, 1873.

AN ACT to provide for the assessment and taxation of lands known as railroad lands.

SECTION 1. *The People of the State of Michigan enact*, That all lands known as railroad lands, situated in this State, which may have been heretofore earned or obtained by any person company, or corporation, by or for the construction of any railroad in this State, shall be assessed and taxed in the same manner that all other lands are assessed and taxed.

SEC. 2. All lands that may hereafter be so earned or obtained by any person, company, or corporation, by constructing any railroad in this State, shall be liable to be assessed and taxed in the same manner that other lands are assessed and taxed, when, and as soon as the certificate of the Governor is executed to the Secretary of the Interior, showing that such person, company, or corporation is entitled to receive patents for such lands.

SEC. 3. To enable the proper county and township officers to faithfully carry out the provisions of this act, it shall be the duty of the Auditor General forthwith to obtain from the office of the Secretary of Interior at Washington, a full and complete list of all lands earned by or patented to any and all railroad companies, under any law granting public lands for the purpose of aiding in the construction of any railroad in this State, which may be liable to assessment and taxation under the provisions of this act, and forward a copy of such lists of said lands to the county treasurer of the proper county in which the same are located, on or before the first day of April, in each year; and it shall be the duty of the county treasurer, on or before the fifteenth day of April in each year, to forward to the supervisor of each township in his county, a copy of such lists of such lands as are located within their respective townships.

SEC. 4. The Auditor General shall receive only such compensation for his services as required by section three of this act, as shall be necessary to pay the proper officer at Washington, for making and forwarding the lists aforesaid, and the amount so paid shall be

audited by the Board of State Auditors, and paid to the Auditor General out of the treasury of the State.

SEC. 5. All laws and parts of laws in conflict with the provisions of this act, are hereby repealed.

SEC. 6. This act shall take immediate effect.

Approved April 19, 1873.

Brief and Argument for Comp'ts.

SUPREME COURT OF THE UNITED STATES.

No. 364.

CHARLES R. TUCKER, OLIVER PRESCOTT, AND SHEPHERD KNAPP, APPELLANTS,

vs.

NELSON FERGUSON, JOHN H. LAMPHIER, WILLIAM BENNETT, ELIAS C. MARTIN, CHARLES F. DEREVAGE, AND NATHANIEL CLARK.

APPEAL FROM THE CIRCUIT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MICHIGAN.

WM. L. WEBBER,
D. DARWIN HUGHES,
Of Counsel for Complainants.

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1874.

CHARLES R. TUCKER
OLIVER PRESCOTT and
SHEPHERD KNAPP,
Complainants and Appellants.
vs.
NELSON FERGUSON, *et. al.*,
Defendants and Appellees.
} *No. 364*

THIS IS AN APPEAL FROM THE CIRCUIT COURT OF THE OF THE UNITED STATES FOR THE SIXTH CIRCUIT, AND WESTERN DISTRICT OF MICHIGAN, IN EQUITY.

CASE.

The Flint & Pere Marquette Railway Company, is a corporation organized under the general railroad law of Michigan, approved February 12, 1855. The Bill is brought by the Complainants, as Trustees for certain holders of Bonds issued by said Railway Company, which Bonds are secured by a Mortgage and Trust Deed executed by the said Railway Company to the Complainants, upon lands granted by Congress to the State of Michigan, and by the State to said Railway Company to aid in constructing said road, and the object of the Bill is to restrain the Defendants, who are Assessing Officers of their several Townships in Osceola County, in Michigan from levying and collecting local taxes upon their several Assessment Rolls upon said lands.

The Complainants' rights are based upon the title of the said Railway Company, which title is founded upon, and evidenced by, certain Acts of Congress and certain Acts of the Legislature of Michigan hereinafter particularly mentioned. The right and title of said Railway Company to said lands, rests entirely upon said legislation, no patents having been issued for said lands, either to the State or to the Company. The particular question in issue is, whether the State authorities can legally impose taxes upon these lands upon the general Assessment Rolls of the Townships, before said roads are fully completed, and while said lands are held by the Company under said grant. The Bill sets forth fully the claim of the Complainants, and refers to the several Legislative Acts constituting their title, and under which exemption from taxation is claimed, and the points made by the Bill are:—

I.

That the lands having been granted by Congress to the State of Michigan to be used solely to aid in the construction of Railroads, and the State having accepted the same and pledged itself to so apply them, and having elected to pass the lands into the hands of the Company to administer the trust, sell the lands, and apply the proceeds to that purpose; the character of the title held by the Company is not that of an absolute fee, but in trust, to apply the proceeds to the particular purpose named in the Act of Congress, and that to subject these lands to local taxation; is to that extent a diversion from the purpose of the trust and therefore illegal.

II.

That by the Act of the Legislature of Michigan, conferring this grant on the said Railway Company, and the acceptance of such grant by the Company in accordance with the terms of said Act, a contract was created between the State and the Company by which the lands, while held by the Company, are exempted from local taxation, which contract is protected by the Constitution of the United States.

III.

Should it be held that the Complainants are mistaken in the second point, as last stated above, then Complainants claim that by the act of the Legislature of Michigan, approved April 18, 1871, and mentioned in the eleventh and twelfth clauses of the Bill, a grant of exemption from taxation is made, for a time not yet expired, which amounts to a contract for the benefit of the said Railway Company, and of which Complainants are entitled to avail themselves, and that the subsequent attempt of the Legislature of Michigan to repeal such exemption is ineffectual to affect Complainants' rights, by reason of the prohibition in the Constitution of the United States, that no State shall pass any law impairing the obligation of contracts.

IV.

That the said Railway Company being subject to and paying specific taxes upon its property, and such specific tax being provided for and appropriated by the Constitution of Michigan, it is not competent for the Legislature to impose local taxes upon the lands while held by the Company.

ERROR ALLEGED.

The particular error alleged in the decree below, is that said decree ruled against the Complainants on each of the points made by the Bill; and it is here claimed that the Bill is maintainable upon each of the points set forth in the statement of the case.

ARGUMENT.

Before proceeding to the argument on the points made for the Complainants, I desire to anticipate and answer an objection that may be interposed to the relief claimed by the Bill.

Art. 15, Sec. 1, of the Constitution of Michigan, which was adopted in 1850, and is still in force, provides that "Corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes. All laws passed pursuant to this section may be amended, altered, or repealed."

Sec. 7 of the same article of the Constitution is as follows: "The stockholders of all corporations and joint stock associations shall be individually liable for all labor performed for such corporation or associotion."

Sec. 10 of the same article of the Constitution provides as follows: "No corporation, except for municipal purposes or for the construction of railroads, plank roads or canals, shall be created for a longer term than thirty years."

The Flint & Pere Marquette Railway Company being organized under the general Rail Road Act of February 12, 1855, was organized after the adoption of the above quoted Constitutional provision, and it is now objected that by virtue of that Constitutional provision, it is competent for the Legislature to alter or change its rights without limitation, and among others the rights of the Company and of Complainants on the points now in question; in other words it is said that a proper construction of the Constitution reserves to the Legislature the power not only to alter, amend or repcal the ACT, but also to alter, change or repeal RIGHTS which have been acquired under it. It is respectfully submitted that such construction is not sound.

The question has frequently been raised; and while it is uniformily held that the power of the Legislature founded upon such a reservation is not without limit, yet the precise limit of such power has not been defined. I refer to

Tomlinson vs. Jessup, 15 Wall. 454.
Miller vs. The State, 15 Wall. 478.
Holyoke Co. vs. Lyman, 15 Wall. 500,

The question here presented is one of great moment.

From the organization of our government it has been deemed necessary to place restrictions upon legislative power, for the protection of individual rights. States were prohibited from passing any law impairing the obligation of contracts. Nearly every State Constitution contains a similar provision. The first Section of the XIV amendment to the Constitution, prohibits States from depriving

any person of life, liberty or property, without due process of law. This Court will take notice of the great proportion of the business of the country, which is now done by corporations, and of the vast amount of property which consists of stock and bonds in such corporations. Never since the Dartmouth College case has it been doubted that a charter accepted, constitutes a contract between the State and the corporators. We now have presented this anomaly, as it is claimed, of a contract which binds but one of the parties to it, of a contract without mutuality; a contract, on faith in which great investments may be made, the value of which may be wiped out by a single Legislative act. Such a contract is against the whole theory and genius of our government in its relation to individuals and individual rights. As applied to rail road property, the absurdity of this construction is shown by considering the nature of the property It is immaterial in considering the value of such property what it has cost. Its value depends upon the income it will produce. Capital invested in railway property may be said to be invested in perpetuity with a view to perpetual income. Whether a mile of track be laid down upon a plain, at a cost of twenty thousand dollars, or whether it be laid across a river or through a mountain at a cost of two hundred thousand dollars, is entirely immaterial to the value of that mile of road. The one may produce as much income as the other. When it is said that the repeal of the charter, or such amendment as will deprive the corporation of the power of earning income, does not impair rights in property, the error of the statement is apparent at sight, to any one familiar with that kind of property. If a rail road Company be deprived of the power of earning income, to concede it the right to gather up its old iron, to take down its bridges, and to convert its cattle guards, its road signs, its switches, its turn-tables, its road crossings, its right of way, &c., into money, is but a mockery. A Company may have expended millions in making tunnels, embankments, bridges, &c., necessary for the successful operation of its road, every dollar of which is a

total loss if the Company be deprived of the power to continue to use it to earn income by operating its road. IT IS RESPECTFULLY SUBMITTED THAT TOO MUCH HAS BEEN CONCEDED TO THE CLAIM UNDER SUCH A RESERVATION: That the clause itself is suseeptible of a construction which will not lead to such absurd results. One object in providing for the organization of corporations by general laws is as a matter of economy, to save the time of the Legislature and prevent it from being frittered away in considering particular acts. Another object was to guard against the temptation to corruption in legislation of this character, where special favors being granted, special considerations might be used to influence legislation, and the reservation of power to alter, amend or repeal such general laws is nothing but a proper safeguard if rightly construed. It is respectfully submitted that the true construction of this reservation of power reserves to the Legislature only the power to change the law itself so as to prevent the formation of other corporations under it, but that it does not reserve the power to change or affect any substantial rights of corporations which have been acquired while the law is in force—in other words, that corporations organized under such general laws, have such general laws for THEIR charter, and that their rights under such general laws, possess the same sacredness, and are no more liable to legislative attack, than rights held by corporations under special charters, where no such reserved power exists. It is not perceived where any other limit can be drawn, without subjecting the tenure of all property in, or the value of which depends upon such corporations, to the will of the Legislature.

This construction is fortified by section ten of the same article of the Constitution of Michigan, which provides that corporations, except railroads, &c., shall not be created for a longer time than thirty years. Now, if a corporation is to subsist only during the pleasure of the Legislature, why provide that it may subsist for a longer time than thirty years? For although the general law may provide that Railroad Corporations may be formed for a period of five

hundred years, if it is competent for the Legislature to repeal the law, and thereby repeal all rights acquired under it, the limit of time goes for nothing, and the charter of the Company degenerates into a mere license to have and exercise the franchises and rights of a corporation, during the pleasure of the Legislature. If it had been the intention to reserve, not only the power to alter the law itself, but also to alter, amend or repeal all RIGHTS which should have accrued under it, it is believed that it would have been stated in such language in the Constitution itself. "Extreme cases test principles," and to render the construction claimed for this reservation of power still more absurd, suppose it to exist as claimed; then the Legislature may cause the corporation to construct such works along its line and at the same time so limit its income by prescribing fares that it will be impossible for the corporation to pay its expenses, and under the personal liability clause found in Section 7 of the Constitution of Michigan above quoted. each individual stockholder is liable for all labor performed for the corporation; and this power might go to the extent, not only of confiscating the entire property of the corporation as such, but also through the operation of that clause, confiscate the individual property of all stockholders in the road as well. It is therefore respectfully submitted that there is nothing in this reserved power in the Constitution which stands in the way of the relief claimed by the Complainants.

It may also be objected that the Defendants are improperly joined. In reply, we consider the rule well settled that a bill is not multifarious, which sets up a general right, though the Defendants have separate and distinct interests.

Barbour on Parties, 455.
Adams Equity (309), 650.
Brinkerhoff vs. Brown, 6 J. Chy. 138.
Mayor vs. Pitkenton, 1 Atk., 281.
R. R Co. vs. Schuyler, 17 N. Y., Rep. 592.
Curtis vs. Tyler, 9 Paige, 432.
Mitford's Pl. 147, 148.
Wheeler vs. Clinton Canal Bk. Har. Chy. 457.
Putnam vs. Sweet, 1 Chand. (Wis,) 287, 332.

We come now to a consideration of the points made for the Complainants.

FIRST.

The Act of Congress approved June 3d, 1856, granting to Michigan certain lands to aid in the construction of rail roads and for other purposes, (11 U. S. Statutes at Large, 21) provides "that the lands hereby granted shall be exclusively applied in the construction of that road for and on account of which such lands are hereby granted, and shall be disposed of only as the work progresses, and the same shall be applied to no other purpose whatsoever." And in section 3 further provides, "that the said lands hereby granted to the said State, shall be subject to the disposal of the Legislature thereof, for the purposes aforesaid and no other."

In the Act by which Michigan conferred these lands upon the Railway Companies, which act was approved February 14, 1857, the State, in the first section, accepts of the grant made by Congress "with the restrictions, and upon the terms and conditions contained in said act of Congress"

In the third section it is provided that "the lands, franchises, rights, powers and privileges hereby conferred upon and vested in said Railroad Companies, or either of them, shall be exclusively applied in the construction of their respective lines of railroad, as above designated, and said lands shall be applied to no other purpose whatsoever."

Our first point is, that the Company, taking its title under this legislation, takes only an estate in trust. The lands being pledged to aid in the construction of the railroad, are to be sold and the proceeds used for that purpose. Had the State seen fit to manage these lands through its own State Land Office and by the State Land Commissioner, and to dispose of the same pursuant to the act of Congress as the road should progress, paying the proceeds into the hands of the Railroad Company, it would not have been claimed that the right to impose local taxes upon the lands existed. With the State thus managing the trust, to have imposed taxes upon the lands and then paid

those taxes out of the proceeds of the sales of the lands, would have been clearly a breach of the condition under which the trust was accepted—to "apply the proceeds to no other purpose." It is not perceived that the case is made different because the State chose to place the lands in the hands of the Company to be managed, rather than manage them through its own Land Department. Had the grant been one of money or bonds, the State would not have assumed the right to tax the donation until worked into the railroad, when it would have been covered by the specific tax. Being a grant of land, until the title of the Company became absolute, discharged from the trust, or in other words, until the road is completed and the lands sold and proceeds applied, the right to impose local taxes on the land cannot exist unless the right to tax locally the money or bonds could have been enforced, had the donation been of that character.

"The power to tax gives the power to destroy;" and for the State, after having accepted this grant and passed the same over into the hands of the Company, and before the proceeds have been applied to the construction and completion of the road, to assume to tax the lands, to the extent of the tax imposed, is a breach of the condition by diverting the proceeds to another purpose. Again, suppose the taxes are not paid. The power to tax implies the power to enforce the collection of the tax. The State, by its general law, provides for enforcing the collection of the taxes by a sale of the lands, and assuming the proceedings to levy and collect the tax to be regular, if these local taxes should not be paid, the State, by its machinery for collecting, would sell the lands and thereby prevent the application, either of the lands or their proceeds, to the purpose for which they were granted by the act of Congress.

The conditions under which Michigan was admitted into the Union prohibited her taxing these lands while they belonged to the United States. It was competent for the United States to make such disposition of the lands as

seemed proper, and the power is subject to no limitations. "No State Legislature can interfere with this right or embarrass its exercise."

Gibson vs. Chouteau, 13 Wall. 92.
See also Brewer vs. Kidd, 23 Mich. 440

Michigan might have declined to accept the grant upon the conditions which were imposed, but having accepted it, she has no right to complain of the conditions. Had these lands remained the property of the United States, or had the State retained the title and managed it through its own Land Department, their exemption from taxation would have been equally as great a hardship as their exemption when managed by the Company Again: one of the conditions on which this grant was made, was that these roads should be built, and they are made post roads. It is also a condition that the even numbered sections within six miles of the line shall be sold at double minimum price, and this is on the theory that the construction of the road enhances the value of the lands. Both the United States, and the purchasers at this enhanced value, have a right to insist that the road shall be built. Now, suppose the Railway Company constructs a portion of the road and declines to construct the remainder. It is not in the power of the Railway Company to use these lands without completing the construction of the road, and should it seek to do so a court of equity would promptly restrain it, and if necessary appoint a receiver to cause the lands to be sold, and the proceeds to be worked into the railroad. So long as they have been solemnly set apart for that purpose, the Railway Company cannot divert them, neither can the State by this process of taxation.

In the case of the Illinois Central Rail Road Company vs. The County of McLean, et. al., 17 Ill. 291, which was a suit to enjoin the collection of the tax upon the Ill. Central R. R. lands, the court, among other things, says, on page 299: "The period for performance on the part of

the Company has not expired, and nothing appears in the record to show that there has been full performance on the part of the Company, and that the State is discharged thereby from liability to the United States, arising out of the grant to the State. Until such performance the State has a *subsisting* interest in the property, and the necessities of self-protection incident to sovereignties, as well as to persons, would seem to suggest the propriety and right, in the State, of protecting the security from destruction by a sale of the property for taxes, had the Constitution been silent on the subject."

In the case of Railway Company vs. Prescott, 16 Wall. 603, the court holds that the lands were not subject to State taxation, although the road had been entirely built and approved by the President. In that case the Statute provided that a patent should issue to the Company only as each section of forty miles in length should be completed and accepted by the President. The Statute also provided that any of the lands not sold by the Company within three years after the final completion of the road, should be liable to be sold to actual settlers under the pre-emption laws at $1.25 per acre, the money to be paid to the Company. The act was amended two years later, and by the amendatory Act, the Company, before receiving conveyance, was required to pay into the Treasury of the United States the cost of surveying, selecting and conveying said lands. When the tax was levied, it appears that the line of road had been built and approved by the President. But the Court decides the tax illegal for two reasons. First, that the cost of Survey, &c., had not been paid; and second, because the contingent right of offering the land to actual settlers at the minimum price asked for its lands by the Government, forbade the State to embarrass those rights by a sale for taxes.

The principal of that case applies here. The United States have sold lands along the line of the road in advance of its construction, at a double minimum price, and it is the right of the purchasers of these lands and the duty of

the United States, to see that the road is built ; else such purchasers have paid double price for no consideration. Second, if the road be not completed, the United States is deprived of the "public highway" for the transportation of its troops, &c., stipulated for ; third, if the road be not completed, the United States is deprived of its mail route stipulated for ; fourth, if the road be not completed, and if these lands in the hands of the Company unsold be diverted to another purpose by a sale for taxes, the United States is deprived of its reversion.

Within the principle of the cases above cited, while there is a subsisting interest of the United States, for which these lands are security, the lands themselves are not subject to State taxation. The grant was made to and accepted by the State subject to the express condition that it should be applied to no other purpose than the construction of the road. It was as well known then as now, that it requires money to build railroads, and when the Statute says that the lands shall be applied to no other purpose, it is to be construed as though it read that the *proceeds* of the lands shall be applied to no other purpose. Until the lands be sold and the proceeds received, there can be no application for constructing a road. That it was understood by Congress that it was the *proceeds* of these lands that should be applied, is evident from the fact that Congress authorized the sale of one hundred and twenty sections before any road should be built, and thereafter the sales were to be authorized from time to time, as twenty mile sections additional should be constructed. If a direct appropriation of the lands as compensation for building the road had been contemplated, authority to sell would not have been given, but authority to take the lands themselves by an absolute title in fee, would have taken the place of the authority to sell. It may be urged that the Company might hold these lands for an indefinite length of time. We might reply to this, that if the United States had seen fit to withdraw these lands from market, they might have been withheld indefinitely at the pleasure of the United States, free from

State taxation, and the hardship to the State is no greater in one case than in the other. But in the language of the Court in the R'y Co., vs. Prescott, above referred to, "it is wisely provided that these lands shall not be used by the Company as a monopoly of indefinite duration." The Constitution of Michigan provides that no corporation shall hold real estate for a longer period than ten years, except such as shall be actually necessary for the purposes of its franchises, and it is a sufficient answer of itself to say that Congress in making the grant, has not seen fit to impose any other or further restrictions in that regard.

In the case of the People vs. Auditor General, 7 Mich., p. 84, the Supreme Court of Michigan, after alluding to the legislation by which lands were appropriated by Congress to aid in the construction of the St. Mary's Canal, on p. 89, says "it is evident from a consideration of these acts that the land was never a part of the public domain of Michigan, either by grant from Congress or by sale to a purchaser before the passage of the act in question, so that the right of taxation had accrued to the State. It was granted to the State for the specific purpose of being applied either by sale or appropriation to the purposes of the construction of the canal. As such it assumed the character of a fund to be expended under the direction of the State; and so the Legislature evidently regarded it, and that the State held such land only as a trustee for the accomplishment of that purpose." So it may be said in this case, that these railroad lands, until sold so that they may be applied to aid in the construction of the railroad, have not become a part of the public domain of Michigan, so that the right of taxation has accrued to the State.

The case of Denniston vs. The Unknown Owners, &c., 29 Wis., 351, (January Term, 1872,) was a bill filed by the plaintiff to quiet his title to about seven thousand acres of land which had been taxed, sold and deeded by the State to him. The lands were part of the Fox and Wisconsin River grants, and had been transferred by the State to the Fox and Wisconsin Improvement Company, or to trustees

for its use, and said Company was to make the improvement. It was held by the Court that the said Improvement Company became the agent of the State to improve the rivers, and that the title of the State was not so far divested as to render the lands taxable while the title remained in the trustees.

The railroads, when constructed, although owned and managed by private corporations, are really public highways. As such the interest to be promoted by the grant is a public one, and should receive favorable consideration. The argument here made is believed to be in accordance with the general policy of the government. It has been held that lands appropriated by the Government to the use of Indians cannot be taxed by State authority.

Kansas Indians, 5 Wall. 737.
New York Indians, 5 Wall. 761.

Section 12 of the Act of Feb. 14, 1857, is as follows:

"SEC. 12. All of said railroad companies shall at all times and in all matters, be subject to the laws of this State, and to such rules and regulations as may from time to time be enacted and provided by the Legislature of the State of Michigan, in regard to the management and disposition of the said lands, not inconsistent with the provisions of this act, and the act of Congress making said grant of land to this State, and they shall be entitled to all the immunities and privileges conferred by said laws: *Provided*, That nothing herein contained shall be so construed as to relinquish the right of the State to any specific tax imposed upon any railroad company within this State."

The Supervisory Control here retained by the State is entirely inconsistent with the idea that the title passed to the Company was that of a fee simple absolute, and would be entirely lost to the State if the lands be assessed and disposed of for taxes as contemplated by the action of the defendants in this case.

SECOND.

The second point above stated is, that under the act of Legislature of Michigan, approved February 14, 1857, conferring this grant on said Railway Company, and the acceptance of such grant, a contract was created between

the State and the Company by which the lands, while held by the Company, are exempted from local taxation. The Title of said Act and the sections relied upon are the following:

"AN ACT disposing of certain grants of land made to the State of Michigan for Railroad purposes, by act of Congress approved June third (3), eighteen hundred and fifty-six (1856)."

"SECTION 1. *The People of the State of Michigan enact*, That the lands, franchises, rights, powers and privileges granted to and conferred upon the State of Michigan, by an act of Congress entitled "An act making a grant of alternate sections of land to the State of Michigan to aid in the construction of certain railroads in said State, and for other purposes, approved June third (3), eighteen hundred and fifty-six (1856), be and the same are hereby accepted with the restrictions, and upon the terms and conditions contained in said act of Congress."

"SEC. 2. So much of the aforesaid lands, franchises, rights, powers, and privileges as are or may be granted and conferred, in pursuance of said act of Congress, to aid in the construction of a railroad from * * * * * *

[The omitted portion of this section relates to other railroads.]

* * Pere Marquette to Flint, and thence to Port Huron, are hereby vested fully and completely in the Flint and Pere Marquette Railway Company, and in the Port Huron and Milwaukee Railway Company, according to the provisions of the act of Congress relating thereto, and the direction of the Board of Control hereby appointed; * * * All and each of the several railroad companies mentioned in this section shall be subject to all the conditions, restrictions and obligations imposed upon them by this act, as hereinafter provided."

"SEC. 3. The lands, franchises, rights, powers and privileges, hereby conferred upon and vested in said railroad companies, or either of them, shall be exclusively applied in the construction of their respective lines of railroad, as above designated, and said lands shall be applied to no other purposes whatsoever; and each and every one of said railroads, when completed, shall, in all respects, and in all parts, be a first-class railroad; and the rail thereof shall be the "T" or continuous rail."

"SEC. 5. Each and every one of said railroad companies is required, by a vote of a majority of the directors thereof, to accept the lands, franchises, rights, powers and privileges hereinbefore conferred, which acceptance shall be

embodied in a written instrument, signed by the President, and attested by the Secretary and corporate seal of said company; and in such acceptance, each of said companies shall severally assent and agree to the provisions and requirements of this act, which acceptance shall be filed in the office of the Secretary of State of Michigan, within sixty days after the passage of this act."

"SEC. 6. It shall be the duty of each of said railroad companies on or before the first day of December next, to locate the line of its railroad, and to make complete maps of said line, and to file copies of such maps in the offices of the Governor and Secretary of State of Michigan; and it shall be the duty of the Governor, after affixing his official signature to the duplicate map of each of said roads, to file them in the department having control of the public lands in the city of Washington; said lines so located shall not be considered absolutely final, further than to fix the limits and boundaries within which said lands may be selected, but said company shall have the right to make alterations thereof when necessary to improve said line: *Provided*, Such alteration shall not materially change or alter such road."

"SEC. 7. Each of said companies, after the completion of twenty continuous miles of its railroad, and after the Governor shall have certified to the Secretary of the Interior that such twenty continuous miles of its road are so completed, then and not before, said company may sell sixty sections of land included within any continuous twenty miles of its line of road; and in like manner upon the complation of each other twenty continuous miles, it may sell other sixty sections; and so on from time to time until the whole of its road is completed; and after the full and final completion of the entire length of its road, and the acceptance of the same by the Board of Control herein provided; then the company may sell the remainder of the lands hereby invested in accordance with the act of Congress aforesaid, and not before; and none of the lands hereby granted to said several companies shall be liable to taxation for seven years from the first day of September next; except such parts and parcels thereof as shall be actually sold by said several companies, pursuant to the provisions of this act, or such as shall be improved."

"SEC. 8. For the purpose of securing the construction of the aforesaid railroads, within the time limited and in the manner prescribed in this act, and for the purpose of properly managing and disposing of the lands appropriated to aid in the construction thereof, the Governor of the State

of Michigan, together with six commissioners, to be nominated by the Governor and confirmed by the Senate, are hereby constituted a board of control of the same, whose duty it shall be to manage and dispose of such lands in aid of the construction of the aforesaid railroads, in the manner in this act provided, and to do any and all other acts necessary and proper respecting the construction and building of said railroads, which shall be prescribed by law; the Governor shall be ex-officio the president of the said board; the commissioners shall hold their office from the time of their appointment until the fourth (4) of March, eighteen hundred and sixty-one; any vacancies that may occur between the sessions of the Legislature, by death, resignation or otherwise, shall be filled by the Governor until the first meeting of the Legislature after such vacancy shall occur. The commissioners shall receive five dollars a day and necessary expenses, for each day that they shall be actually employed in the duties of their office; the amount of such allowance and expenses shall be apportioned among the different companies in such a manner as the board shall deem equitable, and shall be paid by the several companies from time to time as the board may direct."

"SEC. 11. Should either of said railroad companies fail to accept said lands on the terms of this act, within sixty days, or fail to make the survey and maps by the first day of December next, or fail to construct its entire line of road or any part thereof, in the time and manner required, in such case said board of control shall have the power, and it is hereby made their duty, to declare said lands, so far as they have not been sold in good faith, forfeited to to the State, and said Board of Control are hereby required to confer said lands upon some other competent party, under the general regulations and restrictions of this act."

"SEC. 12. All of said railroad companies shall at all times and in all matters, be subject to the laws of this State, and to such rules and regulations as may from time to time be enacted and provided by the Legislature of the State of Michigan, in regard to the management and disposition of the said lands, not inconsistent with the provisions of this act, and the act of Congress making said grant of land to this State, and they shall be entitled to all the immunities and privileges conferred by said laws: *Provided*, That nothing herein contained shall be so construed as to relinquish the right of the State to any specific tax imposed upon any railroad company within this State."

"SEC. 13. It shall be the duty of each of said railroad companies to make a regular annual report of the pro-

ceedings of said company at the usual time and place of electing officers, exhibiting a detailed statement of the amount of all expenditures, work, liabilities, means, etc., a copy of which shall be filed in the office of the Secretary of State, and such other reports to the Board of Control as said board shall from time to time require."

"SEC. 15 Whenever by the crossing of the several lines of railroad herein provided for, or by their running within less than thirty miles of each other, or from any other cause conflicting interests or claims shall arise between any of the aforesaid companies in the selection of their lands, such conflicting claims shall be settled by the Board of Control herein provided for, whose decision shall be final in all such cases."

"SEC. 16. Said railroad companies shall take said grants of land with the conditions imposed, and incumbrances specified in this act, and shall in no court have any claim or recourse whatever upon the State of Michigan for a misapplication of said grants, or for any of the incumbrances or conditions in this act imposed."

"SEC. 19. Each and every one of the aforesaid railroad companies shall complete and put in good running order at least twenty continuous miles of its road, during each year from and after the first day of December next, and shall complete the entire length of its road within seven years from the fifteenth day of November next, except the railroads in the upper Peninsula herein named; and as to these, each and every one of them shall complete the first twenty miles of their several roads within three years from the first day of December, 1858, and the entire lines of their several roads within the time above limited." * *

"SEC. 20. In consideration of the grants of land and other privileges hereby conferred on each of the several railroad companies mentioned and named in section two of this act, the said several railroad companies are hereby required, within sixty days from and after the first day of each and every year, to pay into the treasury of this State, as a specific annual tax, one per cent. upon the cost of the road and its equipments and appurtenances, of whatever kind; and it shall be lawful for the Legislature of this State, in their discretion, after ten years, to impose upon either or each of said railroad companies the payment of a further tax upon the gross or total earnings of such road of not exceeding two per cent.; which said above several taxes shall be in lieu of all other taxes to be imposed within this State: *Provided*, That the provisions of this section shall not apply to railroad companies in the upper

Peninsula of this State until after ten years from the passage of this act: *Provided, also,* That the aforesaid additional tax of two per cent. shall be imposed upon the Detroit and Milwaukee railway company, and the Port Huron and Milwaukee railway company, only in proportion to the amount of land which they shall respectively receive in comparison with the quantity of lands received by the other railroad companies; which proportion shall be settled by the Board of Control."

"SEC. 22. All companies operating roads under the provisions of this act shall keep and maintain all their principal offices within this State."

"This act is ordered to take immediate effect.

"Approved February 14, 1857."

The Bill states (Record p.) that the Railway Company did, on or about the second day of April, 1857, in compliance with this act, file in the office of the Secretary of State of Michigan, a written acceptance of the lands, &c.; and also that the Company located the line of its road, made maps and filed copies thereof as required by said act, and the Demurrer admits these facts as true.

I shall enter into no argument to show that if a contract exists, it is inviolable. Notwithstanding the reservation of power to alter, amend or repeal general laws for the formation of corporations, if a contract was made with the Company, it was in full force when the right of the complainants was acquired; and they being "third parties," no subsequent legislation can, in any event, be held to affect their right. The contract between the State and the Company was made on the part of the State by the Act approved February 14, 1857, and on the part of the Company by its written instrument, signed by its President, and attested by its Secretary and the corporate seal of the Company, pursuant to Section 5, of said last named act. It is difficult to demonstrate a proposition self-evident upon its face; and it is difficult to conceive that any one can claim that said act and its acceptance, do not constitute a contract. We assume that to be conceded. Then the meaning of the phraseology used, and the rights of the parties under it, must be settled by construction. We in-

sist that it was the intention of the Legislature when the act was passed, and of the Company in accepting its terms, that the lands should not be subject to taxation prior to the final completion of the road. Those claiming a different construction, lay great stress upon the clause at the close of Section 7, which provides that none of the lands hereby granted shall be liable to taxation for seven years from the first day of September then next, except what should be sold or improved. But by turning to Section 19, we find that each of the Companies receiving a grant was required to complete the entire length of its road within seven years from the 15th day of November then next; so that taking the two sections together, we find that the intention of the Legislature was to provide that none of these lands should be taxed until the road should be finished. The clause at the close of Section 7, spoken of, is susceptible of still another construction. It was possible that the roads, or some of them, might be completed in a less period than seven years, and in order that an inducement might be held out to them for diligence, and to prevent those who were diligent from suffering in consequence thereof, it might well be provided that no tax should be imposed until after the expiration of the seven years on lands held by the Company, even if the road should be completed prior to that time. We recognize the rule that in construing statutes, every part should be considered and have effect if possible. To construe this clause in any other way than as above indicated, and from its *negative* assertion to deduce an affirmative that the lands should be taxed after seven years, even if still held by the Company, and the road not completed, would do violence to section twenty; while the construction we contend for harmonizes all the provisions. Now suppose that clause providing for not taxing until after seven years, had not been contained in the act, then the only provisions remaining, concerning taxation, are those in Sections 12 and 20, both of which relate exclusively to specific taxes, upon the Company itself, and Section 20, expressly declares that the specific tax

therein provided for, is to be paid in consideration of the grants of land and other privileges in said act contained. It seems impossible by argument to make the proposition clearer than by a bare reading of said Section 20. The proviso in said section that the additional specific tax should be imposed upon the D. & M. R'y Co., and the P. H. & M. R'y Co., only in proportion to the amount of lands received by them in comparison with those received by other companies, makes the demonstration conclusive as to the Legislative intent.

It will be remembered that the Bill alleges (Record p.) that the said Railway Company has been assessed each year and has paid a specific tax levied and collected under the laws of Michigan; and also that from the organization of the State until the year 1870, the property of Railway Companies in Michigan had never been taxed by local assessment and taxation, nor in any other manner than by specific taxes. Article 14, Section 10, of the State Constitution provides as follows: "The State may continue to collect all specific taxes accruing to the treasury under existing laws. The Legislature may provide for the collection of specific taxes from banks, railroads, plank roads, and other corporations hereafter created;" and section eleven provides that "the Legislature shall provide a uniform rule of taxation, except on property paying specific taxes, and taxes shall be levied on such property as shall be prescribed by law."

In construing the Act of 1857, the fact that railway property had never been subjected to local taxation, and the constitutional provisions above quoted, should be borne in mind. It should also be remembered that these lands were not purchased by the Railway Company and held as an investment. They do not come within the doctrine that where a corporation buys property outside of what is necessary for its corporate purposes, it is subject to the same rule as any other purchaser of such property, for these lands were granted to this Company for a specific purpose. When the lands are sold, the money received therefor be-

comes a part of its capital. A road built through a wilderness, where it must wait for the growth of towns and settlement of the country to produce sufficient business to pay interest upon its cost, must have some other source of income than its business to support it, and these lands were offered to the Company and accepted by it as that other source of income I concede that where a railroad company from its surplus funds buys property, not necessary for the exercise of its franchises, although the company may pay a specific tax upon its corporate property, yet it may also be called upon to pay local tax upon such property purchased on speculation, or as an investment, but I deny that that doctrine applies to this case. Where property not necessary for corporate franchises is purchased as above suggested, this Company handles it at its pleasure, and may dispose of the same and use the proceeds for dividends or other purposes, as it pleases. These lands were not held by the Railway Company by such tenure. By the terms of the Act of Congress, 120 sections may be sold before any road was completed. Suppose the State had granted the same right to the corporators. Could the corporators have sold 120 sections. divided the proceeds among themselves and dissolved their organization? Clearly not, because the lands and the proceeds thereof, were pledged for a particular use, and their application to that use might be enforced by the courts.

The Act of February 14, 1857, has been repeatedly amended, but to none of the amendments have the companies been required to express any opinion, or to file any assent. On general principles, such amendments as were favorable to the companies might be presumed to have been assented to by them, but such as were opposed to the interest of the companies have no such presumption in their favor. These subsequent acts may be regarded, so far as they are not within the reservation of Section 12, as proposed modifications of the original contract, but they cannot be regarded, when hostile to the interests of the company, as having been assented to by the company, unless its express

assent be shown. Until 1871, there are none which can in any sense be regarded as hostile to the interests of the F. & P. M. R'y Co. To view this subject justly, it should be regarded from the stand point of the date of the passage of these several acts. It is a matter of public history that the lands embraced in the grant were regarded by capitalists as of so little value, and the prospects of the company for earning money by operating a railroad in a wilderness sufficient to enable them to meet interest as it should mature were so slight, that none of the companies could make any progress whatever in the negotiation of their securities. Had it been suggested that these lands would be subjected to local taxation in the hands of the company, no bonds could have been sold at any price, because capitalists would have believed that the earnings of the road would have been insufficient to pay local taxes and interest on bonds. These lands had been upon the market for many years at ten shillings per acre; many of them under the graduation act at a much less price, and had not been sought as investments. The marvellous effect which has followed the construction of these roads, was not suspected even by the most enthusiastic; and he would have been regarded as a fanatic, who at that day should have suggested such a result. The Legislature and the company viewed matters as they then appeared. The future was uncertain. Securities founded upon such a basis had not been at that time, to any considerable extent, seeking purchasers in the makets of capital. It was found that the provision in section 20, for the additional specific tax upon gross earnings, was of itself a serious impediment to placing securities; and to relieve the companies and their securities from this objection, it was provided by Section 2, of the Act of February 14, 1859, that the companies should "be subject to the same rate of taxation only and in the manner as provided in Section 45 of 'An Act to provide for the incorportion of railroad companies,' approved February 12, 1855," and by Section 3, all contravening acts were repealed. This we regard as a modification of the contract

as originally made, for the benefit of the company, and as such the assent of the company thereto will be presumed. This provision was in force when the bonds, for which the complainants are Trustees, were issued, the express covenant on the part of the State that the Company should be taxed in the same manner and at the same rate only, as other companies organized under the general railroad law. It is not understood how a different mode of taxation and a different rate can be adopted by the State, which will have the necessary effect to depreciate the value of securities issued under the above provision, without impairing the obligation of a contract.

The Legislature in 1863 passed the following act.

"SECTION 1. *The People of the State of Michigan enact*, That such of the railroad companies mentioned in an act entitled "An Act disposing of certain grants of land made to the State of Michigan for railroad purposes, by act of Congress, approved June third, eighteen hundred and fifty-six," approved February fourteenth, eighteen hundred and fifty-seven, as have finished and put in running order twenty miles of their railroad, shall have all the time to finish said roads, and all the powers, rights and privileges relating to each of said roads respectively, as are mentioned in said act of Congress, and shall be entitled to take and sell the lands donated for the use of each of said roads respectively by said act of Congress, at such times, and in such quantities, and under such restrictions as are in said act mentioned; and all forfeitures of charter, franchises and land grants, incurred by such railroad companies as shall have finished twenty miles of their road, as aforesaid, under any laws of this State, are hereby waived. The Amboy, Lansing and Traverse Bay railroad company shall, within six months from the passage of this bill, finish and open their road for use to Michigan avenue, in the city of Lansing; and shall also, in good faith, commence their work on the said road from Owosso to Saginaw city, by the first day of June, eighteen and sixty-three, and shall finish the said road from Owosso to Saginaw city by the first day of January, eighteen hundred and sixty-five. But nothing herein contained shall be construed to extend the time, or grant any other or further privileges than those now existing by law, to any company who shall not have heretofore constructed twenty miles of their railroad: *Provided*, That the Amboy, Lansing and Traverse Bay railroad company shall not be entitled to that portion of

the second one hundred and twenty sections of said land not already conveyed by them, until the said company shall have constructed its road, and opened it for use, to Michigan avenue, in the city of Lansing.

Approved March 19, 1863"

And in 1865 the following act was passed as an amendment of the act of February 14, 1857.

"SECTION 1. *The People of the State of Michigan enact*, That section twenty-one, of the act entitled "an act disposing of certain grants of land to the State of Michigan for railroad purposes," by an act of Congress approved June third, eighteen hundred and fifty-six, approved February fourteenth, eighteen hundred and fifty-seven, be and the same is hereby so amended as to read as follows:

"SEC. 21. All the roads constructed under the provisions of this act shall be the same breadth of gauge with the Central and Southern railroads of this State, except the railroads of the Upper Peninsula; and the said Flint and Pere Marquette railway company shall construct and complete its road from the city of Flint to Pere Marquette, within five years from the first day of June, eighteen hundred and sixty-six; and the said last named company shall have the rights and privileges, and may dispose of the lands granted to aid in the construction of its road, and shall construct the whole line of its road, under and subject to the restrictions, conditions and regulations prescribed and set forth in and by said act of Congress donating said lands, and the resolution of Congress relating thereto, approved February seventeenth, eighteen hundred and sixty-five, and in and by the said act of the Legislature of this State, approved February fourteenth, eighteen hundred and fifty-seven, and the acts amendatory thereof.

Approved March 21, 1865."

This was the condition of the legislation at the time the bonds mentioned in the bill, were issued and placed upon the market; the law at this time being, that the Land Grant Companies should be taxed at the same rate only and in the same manner as other companies organized under the General Railroad Law. The provision in the General Railroad Law of 1855, under which said company was incorporated, is as follows:

"SEC. 45. Every corporation formed under the provisions of this act, shall, on or before the first day of July, pay the State Treasurer, an annual tax of one per cent., on the capital stock of said company paid in, which tax

shall be in lieu of all other taxes upon the property of said company, whether real, personal, or mixed, except penalties by this act imposed; the said tax shall be estimated upon the last annual report of said corporation, but nothing contained in this section shall apply to any existing corporations."

The *rate* was a percentage on the capital stock of the company paid in, and the *manner* was by a specific tax. As hereinbefore shown, the reserved power to alter, amend or repeal, cannot be invoked to affect the rights of the complainants which were acquired and became vested under the charter, in the legitimate exercise of the powers which had been granted to the company. This being so, repeated decisions of the Supreme Court of the United States settle the question that the State can pass no law impairing the obligation of the contract thus existing.

Wilson vs. New Jersey, 7 Cranch, 164.
McGee vs. Mathias, 4 Wallace, 143.
Wilmington Railroad vs. Reid, 13 Wallace, 264.
R. & G. R. R. Co. vs. Reid, 13 Wallace, 269.
Salt Company vs. East Saginaw, 13 Wall. 373.
Furman vs. Nichol, 8 Wall. 44.
Chicago vs. Sheldon, 9 Wall. 50.

In the case last cited, the action of the parties from 1859 to 1866, imposing no tax, was regarded as significant, and as being the contemporaneous construction put upon the language of the grant by the parties in interest. The seven year clause of Section 7 in the act of February 14, 1857, was repealed in 1861, and would have expired by limitation in 1864; and we may well say, that the action of the State authorities since that date, shows the understanding which the Legislature had, as well as the Company, as to the rights under the grant.

Again: The language of the proviso to the seventh section is "and none of the lands hereby granted to said several companies shall be liable to taxation for seven years from the first day of September next, except such parts and parcels thereof as shall be actually sold by

said several companies, pursuant to the provisions of this act, or such as shall be improved."

The Circuit Judge who decided this cause below, held that from this clause "the implication is irresistible that after seven years the lands may be taxed, though still held by the company, and at any time when sold or improved" To reach such a conclusion, however, is to assume that the State had a right to decide at what time these lands should become subject to taxation. If the State had *then* the right to decide that the lands should become subject to taxation, after seven years, it had the right to decide that they should become taxable immediately. The period for reversion to the United States would not expire until after the lapse of ten years, and if the State might fix a limit short of that period, it might with equal propriety fix one time as well as another, the shorter as well as the longer time. The State in fact accepted these lands *in trust*, to apply the proceeds "to no other purpose whatsoever," than the building of the roads. If the State had a right as a condition of granting these lands to aid in building the road, to subject them to local taxation immediately, it would also have a right to impose any other conditions. It might say, these lands shall be used for the purpose of aiding this railroad, provided the promoters of the project will pay into the treasury of the State ten cents an acre, and with equal right or propriety might have said, shall pay fifty cents an acre or any other sum that might be named. The State in this regard is to be treated as a trustee, and the rules applicable to trustees apply. What would a court of equity say to a trustee who happened to be an individual, instead of a State, who should seek to put money in his pocket from his trust, contrary to the conditions under which the same was transferred to him? And why should not the same answer be given to the State when it assumes a right to tax these lands (if the implication which the Circuit Judge finds exists in fact,) after seven years or any other period? The language of the Supreme Court of Michigan (in the case above referred to

of the People vs. the Auditor General, 7 Mich., 84,) is, speaking of the St. Mary Canal grant, "the land was never a part of the public domain of Michigan, either by grant from Congress or by sale to the purchaser before the passage of the act in question, so that the right of taxation had accrued to the State. It was granted to the State for the specific purpose of being applied either by sale or appropriation to the purpose of the construction of the canal. As such, it assumed the character of a fund to be expended under the direction of the State, and the Legislature evidently so regarded it, and that the State held such land only as a trustee for the accomplishment of that purpose." Wherein does the grant from Congress to aid these railroads, differ from a like grant to aid in the construction of a canal? We say then that as to the clause in section seven, it is a mere invalid provision in the act, so far as any implication is to be derived from it, inserted without authority, and that the act is to be construed the same as though that provision were not there. It is negative in its terms, and does not purport to declare any right. It is so framed that the agreement of the company to accept the land in accordance with the conditions of the act, does not estop it from raising this question; and as at the time the act was passed, the lands were the property of the United States, the grant then existing as a float only, the right to tax had not yet accrued to the State, and it was not in the power of the State alone to say when that right should accrue, until the land became a part of the public domain of Michigan, discharged of the trust, or until a sale to a purchaser as the right to tax had not accrued to the State.

THIRD.

Our third point is as follows:

Should it be held that the Complainants are mistaken in the second point, as last stated above, then Complainants claim that by the act of the Legislature of Michigan, approved April 18, 1871, and mentioned in the eleventh and twelfth clauses of the Bill, a grant of exemption from taxation is made, for a time not yet expired, which amounts

to a contract for the benefit of the said Railway Company, and of which Complainants are entitled to avail themselves, and that the subsequent attempt of the Legislature of Michigan to repeal such exemption is ineffectual to affect Complainants' rights, by reason of the prohibition in the Constitution of the United States, that no State shall pass any law impairing the obligation of contracts.

The statute upon which this point is founded, was approved April 18, 1871, section 37 of which reads as follows:

SEC. 7. Every company formed under the provisions of this act shall, on or before the first day of July of each year, pay to the State Treasurer, on the statement of the Auditor General, an annual tax on the gross receipts of said company, computed in the following manner, viz: upon the gross receipts to the amount of three thousand dollars (or less) per mile of road regularly operated, one and one-half per cent; upon the gross receipts in excess of three thousand dollars, and less than six thousand dollars per mile, two per cent; and upon the gross income equal to or in excess of six thousand dollars per mile, three per cent; which tax shall be in lieu of all other taxes upon the property of said company, whether real, personal, or mixed, except penalties imposed by law, except real property not necessary for carrying on the ordinary operations or franchises of their road: *Provided*, Only such lands granted to any railroad company shall be liable to local taxation as are or may be opposite to and coterminous with the constructed portion and portions of said roads respectively: *And provided further*, That no such lands shall be subject to taxation until after the expiration of three years from and after the first day of April, in the year of our Lord one thousand eight hundred and seventy-one, and until after three years from the date of the certificate showing that such lands have been earned by said railroad company, after which time said lands shall be taxed as other lands, except as hereinafter provided: *And provided further*, That the lands of the several land-grant railroad companies, opposite to and coterminous with their lines as now in operation, shall be subject to taxation in two years from said first day of April, in the year of our Lord one thousand eight hundred and seventy-one; and such tax shall be estimated upon the last annual report of said company filed in the office of the Auditor General, as hereinbefore provided; but if such company omits to make a report when due, then the tax shall be estimated upon the best information the Auditor General may obtain; *Provided*, That no corporation formed under the provisions of this

act shall be liable to pay tax on any money expended on any portion of its road which has not been opened for use.

Sections 50 and 55 of the same act, are as follows:

SEC. 50. This act may at any time be altered, amended, or repealed, but such alteration, amendment, or repeal shall not affect the rights of property of companies organized under it; nor shall the dissolution of any such company take away or impair any remedy given for or against such corporation, its stockholders, or officers, for any liability which shall have been previously incurred; and the provisions of this act shall apply to all companies incorporated or existing under the act entitled "An act to provide for the incorporation of railroad companies," approved February twelfth, eighteen hundred and fifty-five, and the several acts amendatory thereof.

SEC. 55 All acts and parts of acts contravening any of the provisions of this act are hereby repealed; but all proceedings pending, and all rights and liabilities existing, acquired, or incurred at the time this act takes effect, are hereby saved, and such proceedings may be consummated under and according to the law in force at the time such proceedings were commenced, or they may be abandoned, and new proceedings taken under this act. Nothing in this section contained shall be construed as in any manner affecting the franchises or privileges heretofore by law granted to the Paw Paw Railroad Company.

In Fletcher vs. Peck, 6 Cranch, 136, Chief Justice Marshall defines a contract as follows: "A contract is a compact between two or more parties, and is either executory or executed. An executory contract is one in which a party binds himself to do or not to do a particular thing. * * * * A contract executed is one in which the object of contract is performed, and this, says Blackstone, differs in nothing from a grant. * * * * A contract executed, as well as one which is executory, contains obligations binding on the parties. A grant in its own nature amounts to an extinguishment of the right of the grantor, and implies contract not to re-assert that right. A party is therefore always estopped under his own grant. Since then in fact a grant is a contract executed, the obligation of which still continues, and since the Constitution uses the general term contract, without distinguishing between those which are executory and those which are executed,

it must be construed to comprehend the latter as well as the former."

If the rule laid down by Chief Justice Marshall, as above quoted, is still the law, (and we certainly know of no case which contravenes the doctrine), and if the Legislature of Michigan had authority in 1871, at the time of the passage of the act above quoted, to grant to these companies exemption from taxation, for a specific definite time, it seems clear that the grant of such exemption contained in the foregoing statute was irrepealable, and was protected by the Constitution of the United States, so that those holding stock or bonds of the companies, and those who should purchase stock or bonds after the passage of such act, might safely rely upon that act as the measure of their rights. Such exemption became a right of property, and the companies organized under the act of 1855 were entitled to the benefits thereof; and section 50 expressly provides that if any legislative amendment or repeal be made, the rights of property shall not be affected by it. In behalf of the Complainants, we still insist that our first and second points are good, and that the assumption to tax after the expiration of the time limited in section 37 of the act of 1871, was without authority, that the lands had not come within the operation of the State laws, as to taxation, and that the rights of the Complainants were among those saved by section 55. But as this third point is based on the assumption that the first and second points are held invalid and unsound, we say on that assumption it seems clear that a contract was here made, that these lands should be exempt from taxation for the time mentioned in the act, and as that time had not elapsed at the time of imposing the taxes mentioned in the bill, the imposition of such tax was a violation of the contract so made, and should be enjoined.

The authorities cited on the second point are equally applicable here as to the rule that is competent for a State by a contract to exempt property from taxation, and that such a contract made is a binding one.

In this connection perhaps it may be proper to suggest that, as it is now well established, railroads are public highways; they are as essential to the prosperity of the public as the public is essential to their prosperity. The true interest of every railroad company is identical with the true interests of the people, who have occasion to use it, and from whom it derives its income. As a certain amount of income is necessary for the support of the railroad, and as the Legislature restricts the income by prescribing the rates at which business shall be done on the road, it certainly is not improper, and this Court has repeatedly held that it is legal, for the public to aid railroads, either by direct donations or exemptions from public burdens, which in principle are the same as direct donations. There is therefore no rule of public policy which should induce a rigid construction against the company, in a case like the one now under consideration, and as the language used in the statute is too plain for construction, we rest this point upon that language, and the rule of law as we understand it, that such a grant once made is irrepealable.

FOURTH.

Our fourth point is that the said railway company being subject to and paying specific taxes upon its property, and such specific taxes being provided for and appropriated by the Constitution of Michigan, it is not competent for the Legislature to impose local taxes upon the lands while held by the company. The provisions upon which this point is based are the following, from Article 14 of the Constitution adopted in 1850:

SECTION 1. All specific State taxes, except those received from the mining companies of the Upper Peninsula, shall be applied in paying the interest upon the Primary School, University, and other educational funds, and the interest and principal of the State debt, in the order herein recited, until the extinguishment of the State debt, other than the amounts due to educational funds, when such specific taxes shall be added to and constitute a part of the Primary School Interest Fund The Legislature shall provide for an annual tax, sufficient, with other resources, to pay the estimated expenses of the State government, the interest of the State debt, and such deficiency as may occur in the resources.

SEC. 10. The State may continue to collect all specific taxes accruing to the Treasury under existing laws. The Legislature may provide for the collection of specific taxes from banking, railroad, plank road, and other corporations hereafter created.

SEC 11. The Legislature shall provide an uniform rule of taxation, except on property paying specific taxes, and taxes shall be levied on such property as shall be prescribed by law.

SEC. 12. All assessments hereafter authorized shall be on property at its cash value.

SEC. 13. The Legislature shall provide for an equalization by a State Board, in the year one thousand eight hundred and fifty-one, and every fifth year thereafter, of assessments on all taxable property, except that paying specific taxes.

In construing the provisions of the Constitution of Michigan above quoted, it must be borne in mind that it always has been the practice of the State to collect specific taxes from railroad companies, and this constitutional provision was evidently framed with a view to the continuation of that practice. Not having been subjected to local taxation, the framers of the Constitution intended that they should not be. Section 45 of the General Railroad Law of 1855 (being the same section hereinbefore quoted) provided for an annual tax of one per cent. on the capital stock of said company paid in, which tax "shall be in lieu of all other taxes upon the property of said company, whether real, personal or mixed, except penalties by this act imposed." In passing the General Railroad Law of 1855, including section 45 referred to, the Legislature doubtless construed the constitutional provisions as we now construe them; that the specific tax paid by the railroad company was a tax which should cover all its property of every kind, whether "real, personal or mixed." The constitutional provision in section one, above quoted, sets apart and constitutes a fund from these specific taxes which the Legislature cannot impair nor destroy. If any part of the property of the railway company may be taxed locally, so may the whole, and if the Legislature might relieve the

companies from the payment of specific taxes and impose local taxes in lieu thereof, this fund might be destroyed, and the purpose specified in the Constitution defeated. The purpose being of the highest importance to the State, the support of the schools and the extinguishment of the State debt, was deemed of sufficient importance to warrant the protection of the fund by this constitutional provision.

By section 10 the State may continue to collect all specific taxes accruing to the treasury under existing laws. The Legislature may provide for the collection of specific taxes from banking, railroad, plank road and other corporations hereafter created.

Now, although this language is permissive in form, I respectfully submit that it is to be construed as mandatory in effect—as a limitation upon the power of the Legislature to impose taxes upon the corporations therein named, other than specific taxes—and for the following among other reasons:

I.

The Legislature has ample power to impose taxes, both general and specific, without any special grant of such power in the Constitution.

Mr. Justice Cooley, in his Constitutional Limitations, p. 479, says: "The power to tax rests upon necessity, and is inherent in every sovereignty. The Legislature of every free State will possess it under the general grant of legislative power, whether particularly specified in the Constition among the powers to be exercised by it or not."

And on page 495, he says upon the subject of taxes; "They may be specific, such as are often levied upon corporations in reference to the amount of capital stock, or to the business done, or profits earned by them, or they may be direct upon property in proportion to its value, &c."

Then, if the language of Section 10 is to be construed as permissive merely, as conferring a power on the Legislature to be exercised at its discretion, the entire section may be stricken out and wholly obliterated from the Constitution without changing the effect of that instrument,

for the power and the discretion as to its exercise still remain in the Legislature under the general grant of legislative power.

But by a familiar rule of construction, this section should be so read as to give it effect, if possible to do so. This can only be done by construing it as imposing a duty upon the Legislature to continue the collection of such specific taxes as were then created by existing laws, and to impose specific taxes only, on such corporations as should thereafter be created—as a limitation on the power of the Legislature in the taxation of corporations to this single mode of specific taxation.

The rule referred to is well stated by the same writer at page 58, as follows: "The rule applicable here is that *effect is to be given if possible to the whole instrument and to every section and clause.* If different portions seem to conflict, the courts must harmonize them if practicable, and lean in favor of a construction which will render every word operative, rather than one which may make it seem idle and nugatory."

Words of permission in statutes are frequently construed as obligatory. *May*, in a statute, means *must* whenever third persons or the public have an interest in having the act done which is authorized by such permissive language.

Rex vs. Barlow, 2 Salk. 609.
Rex vs. Flockwold, 2 Chitty R. 251.
Newburg Turnpike Co. vs. Miller, 5 John Ch. 113.
Malcolm vs. Rodgers, 5 Cow. 188.

And the rules of interpretation of constitutions and of statutes are substantially the same, with this difference however, that constitutional provisions are very rarely treated as directory.

Potter's Dwarris on Statutes, p. 654.
Cooley's Con. Lim., p. 74.

Here the public have an interest in having the act done, for the people of the whole State are benefitted alike from

specific taxes, and have a right to require that they shall be retained.

II.

By Section one an absolute and unalterable appropriation of these taxes is made for a specific purpose. And by Section ten the subjects of such taxation are pointed out and defined. If the latter section imposes no duty and is merely directory, then the Legislature by refusing to impose specific taxes, may render the provisions of section one wholly nugatory, and thus defeat the will of the people.

The plain intent of Section one is to create a fund and place the same entirely beyond Legislative control; and Section ten must be interpreted with reference to that intent. Can it be said that it is so interpreted, when so construed that it leaves the Legislature free to substitute direct for specific taxation upon corporations, and thus destroy the fund?

To make through the constitution a solemn and irrevocable pledge of the public moneys derived from specific taxes, and leave the Legislature free to destroy the pledge by the simple expedient of changing the mode of taxation, would be a solemn farce indeed.

Such a construction of Section ten leads to an absurdity, and ought to be rejected.

It is respectfully submitted that the clear intent and meaning of the two sections under consideration is, that the State shall continue to collect specific taxes accruing to the Treasury under existing laws. And the Legislature shall provide for the collection of specific taxes from banking, railroad, plank road and other corporations thereafter created. And that such taxes and other specific taxes that may be created by law, except those received from mining companies, &c., shall be applied in payment of the interest, &c.

That the framers of the Constitution did not contemplate the imposing of taxes other than specific, upon banking, railroad and plank road corporations, is evident by

reference to the debates upon the article in question, and especially to

Con. Deb. 1850, pp. 684, 687–8, 752–3 and 765.

III.

The Legislature cannot impose both specific and direct taxes upon the same corporation.

When a specific tax is imposed on a corporation, all its property becomes chargeable with the payment of such tax.

Sections 11, 12 and 13, of Article 14, of the State Constitution, above quoted, also recognize the fact that property paying specific taxes is not to be subjected to the direct or local taxation, as other property not paying specific taxes is subjected. When a railroad company pays a specific tax it pays it upon all its property, and it follows by virtue of the constitutional provisions above mentioned, all its property is exempt from direct or local taxation. Any other construction would make nonsense of the constitutional provisions which provide for uniformity of taxation except on property paying specific taxes. It can not be assumed that the Constitution would protect the people by providing for a uniform rule of taxation upon all property except that paying specific taxes, and yet allow the Legislature a discretion in imposing direct and local taxes upon property paying specific taxes. The question here raised on these constitutional provisions has not been directly passed upon by the Supreme Court of Michigan. Some of these constitutional provisions were somewhat discussed in the case of *Walcott vs. The People, 17 Mich., 68.* The case was this: The Legislature had passed an act in 1857 to regulate Express Companies and their agents, and individuals prosecuting an Express business, not incorporated by the State of Michigan. This act imposed a specific tax of one per cent. upon the business of such Express Companies in Michigan. The American Express Company denied the validity of the act, and an action being brought against one of its agents, the question was taken to the Supreme Court. In the opinion, (p. 77)

after quoting Section 1, Article 14 of the Constitution, the Court says: "It is apparent that the fundamental law has irrevocably prescribed the application of all such specific State taxes as that imposed by the act in question, and that the Legislature could in no manner change or alter the destination of the tax." On page 79 the Court further says: "Upon turning to the Constitution it will be observed that the first clause of Section 10, before mentioned, declares expressly that the State may continue to collect all specific taxes accruing under existing laws. Several of the laws thus referred to were of long standing and imposed taxes upon business; many of them applied to individuals and not to corporations. The clause cited had the effect to '*continue*' those taxes. It was a constitutional declaration in favor of specific taxes on the business of individuals in so far as the same was then required by existing laws." Again, on page 80, the Court says, speaking of Section 10, of Article 14 of the Constitution: "Considering the nature and object of a State Constitution, there could have been no necessity for any such specific grant of Legislative power, since according to well settled principles, the particular authority would have been as clearly within the competency of the Legislature without any such provision as with it, and therefore the clause in question must have been intended to accomplish some other object than simply to confer the power to tax the organizations there described." The Court then holds that one object of Section 10 was to confer upon the Legislature the right to specifically tax the corporations thereafter created, and to prevent the Legislature from exempting corporations from such tax, and adds, (p. 82.) "To avoid misapprehension, however, it is proper to observe in this connection that no opinion is expressed as to whether the clause in question would or would not permit any other application than that which is here accorded to it."

Judge Campbell delivered a dissenting opinion, in which (p. 90) after quoting Section 10, of Article 14 of the Constitution, he says:

"These words are permissive in form and are such as are usually interpreted as excluding what is not mentioned by the express power granted. They were needless and senseless as mere grants of power, because the power would have existed without them."

This case while not deciding the point we raise, gives force to the construction contended for. It declares that the appropriation of the specific taxes by Section 1, of Article 14, is one which the Legislature may not interfere with, and as all the sections are to be construed together, and the object and meaning of the Constitution deduced from such construction, it seems clear that it was the intention of the Constitution that the corporations named in Section 10 should be taxed specifically, and that the word *may*, as used in that section, should be construed as mandatory; otherwise the fund which was thus unalterably set apart and appropriated by Section 1, might be entirely diverted. It is but reasonable to say that if the Legislature had no control over these funds when once raised; if they could not divert them from the treasury after being paid in, they could not prevent their accruing to the treasury.

The learned Circuit Judge who decided this cause below, cites as supporting his decision, the cases in Iowa, as follows:

B. & M. R. R. Co. vs. Hayne, 19 Iowa, 137.
Homestead Co. vs. Webster County, 21 Iowa, 221.
C. R. & M. R. R. Co. vs. Woodbury County, 29 Iowa, 247.

But these cases rest upon the peculiar Constitutional and Legislative provisions of that State, and the points there raised differ from the questions here presented. The Iowa Court did not assume to reverse the decision previously made it in *Tallman vs. Butler County, 12 Iowa, 531*, where the facts more nearly correspond to the facts of the case here. The statute of Michigan declared that the specific

tax should be in lieu of all other taxes upon all the property of the company, whether real, personal or mixed, except penalties of the act imposed

In the case in 12 Iowa, on page 534, the Court says: "No property can be taxed, however, until the law-making power authorizes and requires it to be done, and if it be done in one, or in a particular way, that alone can be pursued. It can not be done in another. These are plain and fundamental principles governing the taxing power. And it is equally true, that it is neither the policy nor the justice of the law to tolerate double taxation.

"Applying these familiar rules how stands the case before us? The Legislature has declared that the property of certain corporations shall be taxed in a particular manner. What right have we then to say that this power shall be exercised in a different method. We know of none. It is said that the word property, as used in the law, has reference to the depot grounds, road beds, rolling stock, the stock paid in by stockholders and all interests of that character; and that it can not refer to all the lands or real estate held by corporations, not connected with the immediate use of the road. We answer, that we find no warrant for this construction in the language of the statute. The language is general—'the property of corporations, &c.' This by statutory definition includes 'personal and real property'—and the phrases 'personal property' and 'real property,' include respectively, money, goods, chattels, evidences of debt, 'things in action,' lands, tenements, hereditaments, and all rights and interests therein, equitable, as well as legal. (Stockdale & Morgan, infra; ch. 8, § 26, Code.) Nor is there anything in this construction inconsistent with the manifest intention of the General Assembly. These lands were granted by the General Government before the passage of the act of 1858. The manifest intention was to adopt a rule for the taxation of the property of such corporations. The shares of the stockholders are theoretically, if not practically, measured in value by the property of the corporations. Such corpo-

rations are engaged in the construction of great public highways. As such, it may have been the policy of the Legislature, not to discriminate in their favor in such a sense, as to relieve them from their due proportion of the public burdens; but to facilitate the assessing, collecting and paying of taxes. If the assessment is fairly and fully made, there can be no injustice. These lands were granted to assist in the construction of this road. As such they constitute a trust fund for that purpose. However held, whether in fee or otherwise, by the company, they are a part of the capital—affect the value of the stock—which is taxable through the shares. To tax the land, and the stock also, which represents it, and which is enhanced by the value of the land, it seems to us would be double taxation."

The case of B. & M. R. R. Co. vs. Hayne, 19 Iowa. 137, states expressly on page 139, that by agreement of Counsel the "sole question presented for the adjudication of this Court, was whether the lands included in the grant are liable to taxation by the State after the railroad company became possessed of the unconditional title in fee, but before the same are alienated by it." This concession of an "unconditional title in fee," places the case upon a different ground from the case before us, for as we have before shown, the lands in question are held by the company in trust and it can apply the proceeds only to the purpose named. None of the Iowa cases consider the question as to the right of the State to force the application of the proceeds, by suit in equity, or in other words the right of the State to regard these lands unsold by the company as a security that the company shall complete the entire road according to their contract with the State when accepting the grant. The case in 21 Iowa, 221, is based upon the Act of 1860, of that State, which provides that the property of Railroad Companies should be assessed and taxed like that of all persons. We conclude then that the Iowa cases are not, when rightly considered, authority against

the Complainants, and that for the reasons herein before stated, the prayer of the Bill should be granted.

W. L. WEBBER,

D. DARWIN HUGHES,

Of Counsel for the Complainants.

UNITED STATES OF AMERICA.

IN THE SUPREME COURT

OF THE

UNITED STATES.

October Term, 1874.

CHARLES R. TUCKER, *et al.*,
Complainants and Appellants,

vs.

NELSON FERGUSON, *et al.*,
Defendants and Appellees.

BRIEF FOR DEFENDANTS.

C. A. KENT,
Of Counsel for the State of Michigan.

LANSING:
W. S. GEORGE & CO., PRINTERS AND BINDERS.

THE SUPREME COURT

OF THE

UNITED STATES.

October Term, 1874.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MICHIGAN,

In Chancery.

CHARLES R. TUCKER, *et al.*,

Complainants and Appellants,

vs.

NELSON FERGUSON, *et al.*,

Defendants and Appellees.

BRIEF FOR DEFENDANTS.

STATEMENT OF THE CASE.

Defendants are respectively Supervisors of certain townships in the county of Osceola in the State of Michigan.

Complainants are trustees, to whom the Flint & Pere Marquette Railway Company,—a corporation organized in 1857 under the general railroad law of Michigan passed in 1855,—has conveyed certain lands with the power to sell and provide thereby for the payment of more than two million dollars of

its bonds. These lands were granted by the United States to the State of Michigan, and by the latter to said railway company, for the purpose of building a railroad from Flint to Pere Marquette.

Defendants have taken steps to tax a portion of said lands. Complainants filed the bill in this cause to enjoin such taxation. The taxable character of the lands held by several other railroad companies is involved, and the taxes depending upon the decision in this cause amount to several hundred thousand dollars.

The validity of the taxation in question depends upon the construction of certain statutes of the United States and of the State of Michigan. The material portions of these statutes are cited. In 1856 Congress granted certain lands, including, those in question, to the State of Michigan, for the purpose of building certain specified railroads. U. S. Statutes at Large, Vol. 11, p. 21.

Section one specifies the routes on which the proposed roads are to run, and the methods of selecting the lands, and then provides, "That the lands hereby granted shall be exclusively applied in the construction of that road for and on account of which such lands are hereby granted, and shall be disposed of only as the work progresses, and the same shall be applied to no other purpose whatsoever."

Section three reads thus: "*And be it further enacted*, That the said lands, hereby granted to the said State, shall be subject to the disposal of the Legislature thereof for the purposes aforesaid, and no other; and that the said railroads shall be and remain public highways for the use of the Government of the United States, free from toll or other charge upon the transportation of any property or troops of the United States."

Section four is thus: "*And be it further enacted*, That the land hereby granted to said State shall be disposed of by said State only in manner following, that is to say: That a quan-

tity of land, not exceeding one hundred and twenty sections for each of said roads, and included within a continuous length of twenty miles of each of said roads, may be sold; and when the Governor of said State shall certify to the Secretary of the Interior that any twenty continuous miles of any of said roads are completed, then another quantity of land, hereby granted, not to exceed one hundred and twenty sections for each of said roads, having twenty continuous miles completed as aforesaid, and included within a continuous length of twenty miles of each of said roads, may be sold; and so from time to time until said roads are completed; and if any of said roads is not completed within ten years no further sale shall be made, and the lands unsold shall revert to the United States."

Section five provides for carrying the mails over the said roads at such price as Congress, or the Postmaster-General, may direct.

In 1857, the Legislature of Michigan passed an act approved February 14th, accepting the grant made by Congress, and disposing of the lands in question among certain railroad companies, one of which is the Flint & Pere Marquette. Laws of 1857, p. 346, Section one, accepts the grant contained in the act of Congress, "with the restrictions and upon the terms and conditions contained in said act."

Section two divides these lands among several railroad companies.

Section three reads thus: "The lands, franchises, rights, powers and privileges confirmed upon and vested in said railroad companies, or either of them, shall be exclusively applied in the construction of their respective lines of railroad, as above designated, and said lands shall be applied to no other purpose whatsoever; and each and every one of said railroads when completed, shall, in all respects, and in all its parts, be a first-class railroad; and the rail thereof shall be the 'T,' or continuous rail."

Section four provides that such railroads shall transport the troops and property of the United States free of charge, and

the mails at such price as Congress, or the Postmaster-General, may determine.

Section five provides that within sixty days the railroad companies mentioned shall severally file a written acceptance and assent to the provisions of the act.

Section seven reads thus: "Each of said companies, after the completion of twenty continuous miles of its railroad, and after the Governor shall have certified to the Secretary of the Interior that such twenty continuous miles of its road are so completed, then, and not before, said company may sell sixty sections of land included within any continuous twenty miles of its line of road; and in like manner, upon the completion of each other twenty continuous miles, it may sell other sixty sections; and so on, from time to time, until the whole of its road is completed; and after the full and final completion of the entire length of its road, and the acceptance of the same by the Board of Control herein provided, then the company may sell the rest of the lands hereby invested, in accordance with the act of Congress aforesaid, and not before; and none of the lands hereby granted to said several companies shall be liable to taxation for seven years from the first day of September next, except such parts and parcels thereof as shall be actually sold by said several companies, pursuant to the provisions of this act, or such as shall be improved."

Section eight provides for the appointment by the Governor of Michigan of six Commissioners, who, with the Governor, shall constitute a Board of Control, "whose duty it shall be to manage and dispose of such lands in aid of the construction of the aforesaid railroads, in the manner in this act provided, and to do any and all other acts necessary and proper respecting the construction and building of said railroads, which shall be prescribed by law."

Section eleven reads thus: "Should either of said railroad companies fail to accept said lands on the terms of this act, within sixty days, or fail to make the survey and maps by the first day of December next, or fail to construct its entire line

of road or any part thereof, in the time and manner required, in such case said Board of Control shall have the power, and it is hereby made their duty to declare said lands, so far as they have not been sold in good faith, forfeited to the State, and said Board of Control are hereby required to confer said lands upon some other competent party, under the general regulations and restrictions of this act."

Section twelve reads thus: "All of said railroad companies shall at all times, and in all manners, be subject to the laws of this State, and to such rules and regulations as may from time to time be enacted, and provided by the Legislature of the State of Michigan, in regard to the management and disposition of the said lands, not inconsistent with the provisions of this act, and the act of Congress making said grant of land to this State, and they shall be entitled to all the immunities and privileges confirmed by said laws; *Provided*, That nothing herein contained shall be so construed as to relinquish the right of the State to any specific tax imposed upon any railroad company within this State."

Section nineteen provides as follows: "Each and every one of the aforesaid railroad companies shall complete and put in good running order at least twenty continuous miles of its road, during each year from and after the first day of December next, and shall complete the entire length of its road within seven years from the fifteenth day of November next, except the railroads in the Upper Peninsula herein named; and as to these, each and every one of them shall complete the first twenty miles of their several roads within three years from the first day of December next, and the entire lines of their several roads within the time above limited. So much of the Amboy, Lansing, and Traverse Bay Railroad as shall lie between Hillsdale and Lansing, and between Lansing and the point of intersection of said road with the Detroit and Milwaukee railroad, shall be completed, fully and entirely, and put in readiness for a train of cars, on or be-

fore the first day of November, 1859, and said Amboy, Lansing and Traverse Bay Railroad Company shall build and finish at least twenty continuous miles of its road each year thereafter, until the whole of its line is completed; *Provided, always*, That the entire length of its road from Amboy to some point on or near Traverse Bay, shall be finished by the first day of November, 1865."

Section twenty provides as follows: "In consideration of the grants of land and other privileges hereby conferred on each of the several railroad companies mentioned and named in section two of this act, the said several railroad companies are hereby required, within sixty days from and after the first day of each and every year, to pay into the Treasury of the State as a specific annual tax, one per cent upon the cost of the road and its equipments and appurtenances, of whatever kind; and it shall be lawful for the Legislature of this State, in their discretion, after ten years, to impose upon either or each of said railroad companies the payment of a further tax upon the gross or total earnings of such road, of not exceeding two per cent; which said above several taxes shall be in lieu of all other taxes to be imposed within this State."

Section twenty aforesaid was repealed by an act approved February 15, 1859 (Laws of 1859, p. 558); and by an act approved February 14, 1859, said companies were made subject to the same rate of taxation only as provided in section forty-five of the General Railroad Law, approved February 12, 1855, which act provided "For a tax of one per cent on the capital stock of each company paid in, which tax shall be in lieu of all other taxes upon the property of said company, whether real, personal, or mixed." Laws of 1859, p. 442.

By said last-mentioned act, the quantity of land which each of said railroad companies could sell on completing sections of twenty miles of their respective roads, was increased from sixty to one hundred and twenty sections, and by act approved March 19, 1863, (Laws of 1863, p. 284), such of said compa-

nies as had then finished, and put in running order twenty miles of their respective railroads, were exempted from all forfeiture they had incurred, and were granted all the powers and privileges, all the time to finish their roads, and all the rights to sell the lands donated, provided in the act of Congress by which the lands were granted to the State of Michigan.

By joint resolution of February 17th, 1865 (13 U. S. Statutes, p. 509), the time for the completion of the Flint and Pere Marquette Railroad, was extended for five years.

By act of Congress, approved March 3, 1871 (U. S. Statutes Vol. 16, p. 582), the term for the completion of said last-mentioned road was extended to March 3, 1876, and section two of said act reads thus: "That the State of Michigan may authorize the sale of sixty sections of the land granted to aid the construction of said railroad from Pere Marquette to Flint, whenever and as often as the Governor of said State shall certify that ten additional miles of said railroad is completed and in running order as a first-class railroad; *Provided*, That said lands authorized to be sold as aforesaid, shall include only lands situated opposite to and coterminous with the completed sections; *And Provided*, That in case said railroad shall not be fully completed from Flint to Lake Michigan within the time, as extended by this act, all the lands included in said grant, to which the right to sell shall not then have attached, shall revert to the United States."

In 1871, the Legislature of Michigan passed an act (Laws of 1871, p. 328, to revise the laws for the incorporation of railroad companies, which by section fifty is made subject to alteration, amendment or repeal by the Legislature, and is extended to all corporations formed under the general railroad law of 1855.

Section thirty-seven of this act provides for a tax upon the gross receipts of railroad companies, and then continues thus: "Which tax shall be in lieu of all other taxes upon the property of said company, whether real, personal, or mixed, except

penalties imposed by law, except real property not necessary for carrying on the ordinary operations or franchises of their road; *Provided*, Only such lands granted to any railroad company shall be liable to local taxation as are or may be opposite to and co-terminous with the constructed portion or portions of said road respectively; *And provided further*, That no such lands shall be subject to taxation until after the expiration of three years from and after the first day of April, 1871, and until after three years from the date of the certificate showing that such lands have been earned by said railroad company, after which time said lands shall be taxed as other lands, except as hereinafter provided; *And provided further*, That the lands of the several land grant railway companies, opposite to and coterminous with their lines as now in operation, shall be subject to taxation in two years from said first day of April, in the year 1871."

The Constitution of Michigan, Article XV., Section 1, adopted in 1850, provides that "Corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes. All laws passed pursuant to this section may be amended, altered, or repealed."

A general law as to corporations, which has been in force in Michigan since 1846, says: "Every act of incorporation passed since the twentieth day of April, in the year 1839, or which shall be hereafter passed, shall at any time be subject to amendment, alteration, or repeal, at the pleasure of the Legislature." (Comp. L. of 1871, Vol. 1, p. 1150, section 20.)

The Constitution of Michigan, Article XIV., Section 1, provides: "All specific State taxes, except those received from the mining companies of the Upper Peninsula, shall be applied in payment of the interest upon the Primary School, University, and other educational funds, and the interest and principal of the State debt, in the order herein recited, until the extinguishment of the State debt, other than the amounts due to educational funds, when such specific taxes shall be added

to and constitute a part of the Primary School Interest Fund."

Section 10 of the same article provides: "The State may continue to collect all specific taxes accruing to the Treasury under the existing laws. The Legislature may provide for the collection of specific taxes from banking, railroad, plank road, and other corporations hereafter created."

The tax laws have provided, at least since 1853, "That all property, real and personal, within this State, not expressly exempted therefrom, shall be subject to taxation in the manner provided by law." In 1873, the Legislature of Michigan passed a new law for the incorporaton of railroad companies, and fixing the duties of all railroad companies owning or operating any railroad in the State. Section three of Article III. of this act provides for a tax upon the gross receipts of such companies, and then says: "Which amount or tax shall be in lieu of all other taxes upon the property of such companies, except such real estate as is owned and can be conveyed by such corporation under the laws of this State, and not actually occupied in the exercise of its franchises, and not necessary or in use in the proper operation of its road, but such real estate so exempted shall be liable to taxation in the same manner, for the same purposes, and to the same extent, and subject to the same conditions and limitations as to assessment for taxation, to taxation, and to the collection and return of taxes thereon, as is other real estate in the several townships within which the same may be situated." (Laws of 1873, p. 532.)

A special act passed the same year (Laws of 1873, p. 173) provides, "That all lands known as railroad lands, situated in this State, which may have been heretofore earned or obtained by any person, company or corporation by or for the construction of any railroad in this State, shall be assessed and taxed in the same manner that all other lands are assessed and taxed." A subsequent section provides for the taxation of all similar lands that might thereafter be earned.

The case comes up for hearing on the bill, and a general demurrer thereto. The bill avers that the Flint and Pere Marquette Railroad Company has, in all things, and in due season, complied with the terms of the legislation under which it received its land grant; that lists have been made out by the proper authorities of the lands to which said company is entitled under said grant; that in January, 1863, thirty-three and seven-tenths miles of its road were fully completed; that in all, one hundred and twenty and twenty-five hundredths miles have been completed, and that forty-eight miles still remain uncompleted; that the lands which defendants are undertaking to subject to State, county, and township taxation, all lie in the County of Osceola, are a part of the land grant to said Flint and Pere Marquette Railway Company, and now belong to said Company, subject to the lien of complainants; that none of these lands were opposite to or coterminous with the line of the said Flint and Pere Marquette Railway Company in operation in 1871. Though the bill does not state in express terms, it is properly inferred from what is stated, and was fully admitted in the court below, that the lands which defendants are seeking to tax, are subject to sale by the company, and come within the provisions of the acts of the Legislature of Michigan, passed in 187[illegible], providing for the taxation of railroad lands.

The case was elaborately argued in the Court below, before Emmons, Circuit Judge, and Longyear, District Judge, and the bill was dismissed.

The opinion of Emmons J., in which the District Judge concurred, is given in appendix to this brief. The positions taken in the Court below, in behalf of complainants, were as follows:

1. That the title of the lands in question renders it unlawful to impose the tax in question.

2. That the State of Michigan, by the legislation aforesaid, has entered into an inviolable contract inconsistent with the proposed taxation.

3. That under the Constitution and Laws of Michigan, only specific taxes can be imposed upon the property of railroad companies.

4. That the State of Michigan received the lands in question under a trust to devote their proceeds to the building of the railroad from Flint to Pere Marquette, and that the proposed taxation is inconsistent with such trust.

These positions will be discussed in their order:

I.

The absolute title to the lands which defendants are seeking to tax, is in complainants, subject to the equities of the Flint and Pere Marquette Railroad Company.

The act of Congress of June 3, 1856, conveying certain lands to the State of Michigan to be appropriated for the building of certain railroads, is one of a number of like grants made to various States in aid of internal improvements. The statute conveyed to the State a fee, which, though at first floating, became fixed when the lines of the proposed railroads were located, and the selections by the agents of the Governor had been made.

Opinion of Att'y Gen'l Cushing, Lester Land Laws, p. 512.
Opinion of Att'y Gen'l Black, Lester Land Laws, p. 524.
Rice vs. R. R. Co., 1 Black, p. 358.

Johnson v. Ballou, 28 Mich. p. 379.
35 Iowa, p. 386. 8 Wall, pp. 88, 95.

The State had the right to sell one hundred and twenty sections of land for each railroad at the start, and like quantities as sections of twenty miles were built. If any one of said roads was not built in ten years, the State was to forfeit its rights in the lands devoted to such road, and the unsold lands were to revert to the United States.

The language of the act might lead to the inference that it was the duty of the State to sell the lands granted for money, and appropriate the money to the building of each railroad.

But instead of this, it sold and granted the lands appropriated to each road in a body to a railroad company, under an agreement that it would build the road to which the lands were devoted. The grants by the State to the various companies conveyed a fee, and the title vested in them, subject to the restrictions in the act of Congress and in the grant by the State. At first these grants were subject to several restrictions in addition to those imposed upon the State by the act of Congress. But these restrictions as to several companies, among which is the Flint and Pere Marquette, were all removed by the act of the State of Michigan, passed in 1863, previously cited, and these companies had all the rights in the lands which the State of Michigan could convey. The legal effect of these statutes upon the title to the lands devoted to building the road from Flint to Pere Marquette, is precisely the same as it would have been if the State of Michigan, after accepting the grant contained in the act of Congress, had located the road, and then sold and conveyed the one hundred and twenty sections it was authorized to sell, to the Flint and Pere Marquette Railroad Company, in consideration of its building twenty miles of the projected road, and when this was built, sold and conveyed, another one hundred and twenty sections, in consideration of an agreement to build twenty additional miles, and so on.

In this case there could be no doubt that the company would gain an absolute title to the lands in question as fast as the lands were conveyed to them by the State. And it can make no difference that the sale and conveyance were made at one time, and the power of sale became operative only as the successive sections of the road were finished. The title, which vested in the Company when the right of sale as to any particular lands became operative, was as absolute as though received by a conveyance from the State executed at that time. There is no more possibility of reverter or interest of any kind in the United States, in the one case than in the other. If there could be any doubt whether, under the original grant by the

United States, and the conveyance by the State to the Flint and Pere Marquette Railroad Company, there is a possibility of reverter to the United States of lands to which the power of sale has attached, this doubt is taken away by the act of Congress passed in 1871, heretofore cited, which provides that, if the railroads shall not be completed within the time as extended, "All the lands included in said grant to which the right to sell shall not then have attached, shall revert to the United States." This settles beyond question the fact that there is no possibility of a reversion to the United States of the lands which the State is now seeking to tax. This is also a Legislative interpretation showing that the lands to which the right of sale has attached in behalf of the companies, are sold within the meaning of that word in the act of Congress by which the grant to the State was made.

It was argued in the Court below that there is an interest in these lands in the State of Michigan inconsistent with their taxation, because section 11 of the original act by which the State conveyed its title to the railroad company made it the duty of the Board of Control, in case the road was not completed within the time limited, "to declare said lands, so far as they have not been sold in good faith, forfeited to the State."

This provision was abolished, as we have already seen, by the act of March 19, 1863, which, by putting the company under only those restrictions provided by the act of Congress, made a forfeiture to the State impossible, since the cause which might produce such forfeiture would at the same instant make a forfeiture to the United States, and leave no possible interest in the State. But were it otherwise, there is nothing in the Constitution of the State which forbids the taxation of lands owned by the State. Section 11 of Article XIV. of the Constitution provides that "Taxes shall be levied on such property as shall be prescribed by law," and if the Legislature of the State should choose to imperil any interest the

State may have by exposing it to the risk of sale for taxes, no one else has the right to forbid. Laws which have been long in existence provide for the taxation of a variety of lands, the title to which is in the State. (Comp. L. of 1871, Vol. 1, p. 400.) It was held in the case of the State vs. Haight, 36 N. J. L., p. 471, that land owned by the State was taxable.

Again, the conveyance of the lands in question to complainants, with power to sell and pay the bonds issued, is a conveyance of the title by the company. Complainants have the legal title to the lands in question.

Comp. L. of 1871, Vol. 2, p. 1382, sec. 16, p. 1381, sec. 11.
Briggs v. Davis, 21 N. Y., 574.

The interest of the Flint and Pere Marquette Company is not subject to execution, but is a mere equity.

Trask v. Green, 9 Mich., 358.
Maynard v. Hoskins, 9 Mich., 485.

The position that neither the United States nor the State of Michigan have any interest in the lands in question, is the only one which can protect the rights of complainants. If the railroad should not be finished, and either the State or United States should seek to enforce a forfeiture, the complainants would necessarily insist, and with justice, that they occupied the position of bona-fide purchasers of all the lands to which the company's right of sale had attached. And this position, which would then be necessary for their protection, they ought not now to dispute.

II.

The State of Michigan has not entered into any contract with the Flint and Pere Marquette Company, or with complainants, which forbids the proposed taxation.

1. The Legislature of Michigan cannot make such a contract, if they would.

The provisions of the Constitution and the general act as to corporations, heretofore cited, which provide that all acts of incorporation passed since a date long anterior to the formation of the Flint and Pere Marquette Railroad Company, may "Be subject to amendment, alteration, or repeal, at the pleasure of the Legislature," make it impossible that one Legislature can bind another by any exemption from taxation. The recent cases in the 15th Wallace, Tomlinson vs. Jessup, p. 454; Miller vs. The State, p. 478; and Holyoke Company vs. Lyman, p. 500, are absolutely decisive of the question. It was attempted in the court below to distinguish those cases from this, on the ground that here the statute authorized a contract between the railroad company and complainants, and that this contract could not be set aside, but there is no pretense for any such distinction. Whatever contract was made was with the railroad company, and complainants contracted with this company with full knowledge that any special privileges they might have as to the taxation of their lands were liable to be taken away at the pleasure of the Legislature. There is no more equity in behalf of complainants than that set up in the case of Tomlinson vs. Jessup, in behalf of the stockholders who had purchased their stock in reliance upon a law exempting its property from taxation.

2. The Legislature of Michigan has not attempted to make a contract inconsistent with the proposed taxation. It is well settled that an intention to exempt private property from taxation by Legislative contract will never be inferred except from the clearest language.

Providence Bank v. Billings, 4 Pet., 561.
Philadelphia, &c., R. R. Co. v. Maryland, 10 How., 393.
Jefferson Branch v. Skelly, 1 Black, 447.
Delaware R. R. Tax, 18 Wallace, p. 225.

And like every other contract it must have a consideration.

Cooley's Constitutional Limitations, p. 281.

Privileges which are granted by the State without any agreement as to their continuance, and without the passing of any consideration from the grantees, may be withdrawn at any time.

Christ Church v. Philadelphia, 24 How., 300.
Salt Company v. East Saginaw, 13 Wall., 373.

There is no claim that the Flint and Pere Marquette Railroad Company have ever assumed any obligation, or given anything which can constitute a consideration for an agreement of the State not to tax the lands in question, except in the acceptance of the terms of the act under which they received these lands from the State. Conceding that we have here a contract between the State and the Company, the question is as to its construction. The claim of exemption from taxation is based upon section twenty, the material portion of which is as follows: "In consideration of the grant of land and other privileges hereby conferred on each of the several railroad companies mentioned and named in section two of this act, the said several railroad companies are hereby required within sixty days from and after the first day of each and every year, to pay into the Treasury of this State, as a specific annual tax, one per cent upon the cost of the road and its equipments and appurtenances, of whatever kind; and it shall be lawful for the Legislature of this State, in their discretion, after ten years, to impose upon either or each of said railroad companies, the payment of a further tax upon the gross or total earnings of such road of not exceeding two per cent; which said above several taxes shall be in lieu of all other taxes to be imposed within this State."

To the claim of exemption founded on this provision, there are several answers.

a. The section, by its very terms, refers only to taxation upon the cost of the road and its equipments, and to taxation of the gross receipts, and the limitation in the last clause, must be referred only to the taxation previously mentioned. There is here no reference to the taxation of the lands in question.

It is well settled, that laws which provide for the exemption or the specific taxation of corporations, which, by their terms, include their entire property, will be construed to extend only to such property as is needed for the transaction of the business for which the corporation was organized.

See the opinion of the court below, and the cases cited upon this point. The settled tendency of all the courts is to a narrow construction of all exemptions from taxation.

Here complainants seek such aconstruction as shall extend the words of the act beyond its natural meaning, and exempt a large amount of private property from the common burden of taxation.

b Section twenty was repealed by the Legislature of 1859, and the taxation of the land-grant railroads was made uniform with that of other railroads, under section 45 of the General Railroad Law of 1855, which provided for a tax of one per cent upon the capital stock paid in of any company.

Laws of 1859, p. 442, 558. Comp. L. of 1857, Vol. 1, p. 652.

This change diminished the rate of taxation upon the Flint and Pere Marquette Company, and they assented to it by paying the lesser taxes, as is shown by the averments of the bill. Hence they can claim no rights under the law thus repealed. If it be said that section 45 was substituted for section 20, as a part of the contract, the answer is that section 45 is part of an act expressly made amendable or repealable at any time,

and the tax provided in section 45 has been changed by the act of 1873 (Laws of 1873, p. 532), and the bill avers that the company has paid its tax for the year 1873, in accordance with this last law.

c. Section seven of the same act is entirely inconsistent with the construction sought to be put by complainants upon section twenty. It provides that "none of the lands hereby granted to said several companies, shall be liable to taxation for seven years from the first day of December next, except such parts and parcels thereof as shall be actually sold by said companies pursuant to the provisions of this act, or such as shall be improved."

The obvious inference is that section twenty was not supposed to make any provision as to the taxation of these lands, and by providing that they should not be taxed for seven years, it is clear that both parties must have supposed them taxable, except for this provision, and after it expired.

To this argument, counsel for complainants in the court below replied that the object of section seven was to provide against the possibility of taxing the lands of the companies within the seven years, even though the roads might be finished sooner; that it was understood that the lands were untaxable until the roads were completed, and that the intention was to provide that the companies which by diligence should complete their roads before the time limited, should not thereby lose the exemption from taxation which they would enjoy in taking the whole time allowed. This most unnatural interpretation puts the companies in the position of wishing to provide against loss in case they completed their lines before the time limited, a position ridiculous whether looked at in the light of the circumstances under which the land grants were accepted, or in that of succeeding events. This interpretation is based on the supposition that the exemption for seven years corresponds with the time in which the railroads were to be built. It is true that the companies generally were

to have their roads completed seven years from the 15th day of November, 1857, that is in November, 1864; but the Amboy, Lansing, and Traverse Bay Company, was allowed until the first day of November, 1865, and yet the exemption of its lands from taxation is the same as that of the other companies, which clearly negatives the alleged intention of the Legislature. Complainant's construction of section seven, strained as it is, still does not harmonize with their construction of section twenty, for it shows that section twenty was not intended, as they claim, to provide for all the taxation to which the companies might become liable. If the taxation in section twenty was to cover the whole taxable property of the company, then it would cover the unsold lands after the completion of the roads, and section seven was unnecessary. It cannot be that complainants can found an immense exemption of private property from common public burdens, on such intricate and unnatural reasoning as they find necessary to avoid the natural inference deduced from section seven.

The bill claims that the General Railroad Law of 1871, heretofore cited, which provided a specific rate of taxation, constituted a contract between the State and the companies, subject to its provisions. And a similar claim was made in the argument of the case below, in reference to the acts of 1859, heretofore cited, by which the taxation of the land-grant companies was put upon the same basis as that of other railroad companies. In neither case was any consideration given by said companies for the alleged contract, and both of said provisions were in general laws which are expressly made, as we have before shown, subject to amendment or repeal, at the pleasure of the Legislature. At the most the provisions relied on were but grants of privileges which could be withdrawn at any time.

III.

The taxation defendants are seeking to enforce is not in conflict with the Constitution of Michigan.

The claim is that it is in conflict with the constitutional provisions heretofore cited, one of which says: "The Legislature may provide for the collection of specific taxes from banking, railroad, plank-road and other corporations hereafter created," and the other provides what shall be done with all specific taxes collected by the State.

To this claim there are at least two sufficient replies:

1. The specific taxes which may be imposed upon corporations cover only such property as is used in the prosecution of the purpose for which the corporation is organized. This is shown in several ways.

a. By the reasons on which specific taxation is founded. These are: The impossibility of estimating the value of the corporation property in the usual way, and especially the difficulty and annoyances connected with dividing this property among the various assessment districts in which it may be situated. These reasons do not apply to lands held for sale by a corporation as the Flint and Pere Marquette Company hold their lands.

b. The authorities cited in Judge Emmons' opinion, upon the construction of statutes providing for specific taxation, in lieu of other taxation, show that specific taxation is not held to include lands situated like those of the Flint and Pere Marquette Railroad Company.

c The same is shown by the fact that many of the statutes of the State which provide for specific taxation expressly declare that it shall extend to only a portion of the property of the companies. Comp. L. of 1871, Vol. 1, pages 411, 418, 420, 421, 947, 948, 1084, 1101. The first citation is from an act in force when the Constitution of Michigan was adopted, and by showing that the specific taxation of railroad companies then existing covered only property used in the construction or

maintenance of these roads, shows that this was the kind of specific taxation contemplated in the constitutional provision heretofore cited.

If the Legislature are bound to tax the property of corporations by specific tax, this is not the limit of their power. The specific tax required has been imposed from the beginning upon the Flint and Pere Marquette Company. It is of the mere favor of the Legislature that for a long time after the expiration of the exempted seven years they have not also been taxed on the property not included under the specific taxation.

2. "May" in the Constitution of Michigan does not mean "shall." This is perfectly evident from a comparison of the numerous passages in which these words are respectively used. If "may" in the provision under consideration means "shall," then only specific taxes should be imposed on any corporation. But this is in conflict with the constant practice. Many corporations in Michigan are taxed in the same manner as natural persons. Comp. L. 1871, Vol. 1, pages 360, 1026, 1068, 1076, 1081. The reasons which justify specific taxation of the property used in the conduct of a railroad have no application to many corporations, and the word "may" was used in the Constitution for the very purpose of authorizing the Legislature to make the proper discrimination.

When "may" in statutes has been construed to mean "shall," it has been when some officer has been given an authority which, under certain circumstances, it is his duty to exercise to protect some private or public right.

Sedgewick on Stat. and Cons. Law, p. 438.

But I think no such construction was ever given where the powers of the Legislature were in question. Neither do I see how the Flint and Pere Marquette Company can claim that it has a right to bear only specific taxation.

IV.

The taxation sought to be enjoined is not inconsistent with the trust under which the State of Michigan received the lands in question from the General Government. A trust is but an implied agreement, and the same rules which govern the interpretation of an alleged agreement for exemption from taxation, apply with equal force to a trust under which such exemption is claimed. In either case the alleged exemption will be sustained only when it is shown in the clearest manner.

1. The taxation of such lands before the execution of such trust, is not inconsistent therewith.

The argument of the complainants is based on those clauses of the act making the grant, which provide that the lands granted shall be applied to the purposes of the proposed railroads, and to no other purpose. It is said that by taxation the State takes away a part of the value of the lands, and therefore misappropriates that part. No authority was cited in the court below in favor of this position. Nor have I been able to find any decision which favors it in the least. Nor does the claim seem based on sound principles. If a private individual or corporation should convey land in trust to another to devote the proceeds to a certain purpose, no one would claim that the trustee is bound to pay the taxes out of his own pocket. And if a private person should convey land in a like trust to the State, the question whether the land was taxable or not would depend upon whether the lands of the State in like condition were made taxable by law or not. As in the former case, the conveyance would be subject to existing laws, and neither party could be supposed, in the absence of express agreement, to intend making any change in the effect of the laws. And if the United States convey a grant to one of the States, the question whether the land is taxable or not will depend upon whether laws which affect the land make it taxable or not,

and not at all upon any implied agreement as to taxation. As long as the United States have a substantial interest in the lands, it will not be taxable, because United States lands are not subject to taxation. Whether such lands will become taxable when the title vests in the State, depends upon the State laws. No agreement ought to be implied which will remove such lands from the effect of the general laws relating to similar lands. Again, if the United States sell their lands to individuals for money, there is no doubt that they become taxable at once. There seems just as little doubt that if they convey lands to private individuals or corporations, in consideration that they agree to build a railroad therefor, that the same result must follow. As soon as the lands become private property, they follow the general rule and become taxable. Nor will it affect the matter that the grantee promises to devote the lands to building a specified railroad, and to no other purpose. And the substantial result of all the United States and State acts concerning the lands in question in this suit, is a conveyance by the United States to the Flint and Pere Marquette Company, under an agreement to build a certain road, the conveyance being so made as to vest a complete title in the grantee to different portions of the lands conveyed as different portions of the road are built. The fact that the title passed through the State, and that it selected the grantee, does not affect the result that the grantee has the exact title conveyed by the act of Congress, and stands in the same condition in reference to the lands that it would have stood had the conveyance been direct to the company.

The arguments of complainants that the State must see to it that the entire proceeds of the lands free from taxation go into building the contemplated road, proves too much. For, if it be valid, then the State would be bound to have kept an exact account of the prices for which the lands were sold and the use which was made of the money. It should have seen that all the money received went into the construction of the road. And this duty would not cease until every dollar of

the proceeds of the land had been thus expended. It would not be enough that the road had been completed, since any money left might be expended in laying a double track or making other improvements. In other words, the method adopted of giving the whole of the lands conveyed to certain corporations under agreement to build the contemplated roads is illegal. But this course has been ratified by the acts of the United States heretofore cited, and has been the common, if not the universal, method adopted by other States in the disposition of similar land grants.

Comp. U. S. Statutes, Vol. 11, p. 50, and Laws of Miss., 1858, p. 118.
Comp. U. S. Statutes, Vol. 11, p. 20, and Laws of Wis., 1865, p. 154.
Comp. U. S. Statutes, Vol. 11, p. 18, and Laws of La., 1857, p. 76.
Comp. U. S. Statutes, Vol. 11, p. 15, and Laws of Florida, 1856–7, p. 9.
Comp. U. S. Statutes, Vol. 11. p. 9, and Laws of Iowa, 1856.
Comp. U. S. Statutes, Vol. 11, p. 195, and Laws of Min., 1858, p. 96.
Comp. U. S. Statutes, Vol. 10, p. 155, and Laws of Ark., 1855, p. 149.
Comp. U. S. Statutes, Vol. 10, p. 155, and Laws of Mo., 1853, p. 10.

Again, the argument is as inconsistent with specific taxation as with that upon the lands. For, specific taxation on the cost of the road already finished may, and probably will, be paid out of the proceeds of the sales of land, and hence diminish the fund for the completion of the road, just as really and perhaps as largely, as the proposed tax on the lands. Section twenty of the act of the Legislature of Michigan, under which the Flint and Pere Marquette Company received its lands, provides for a special rate of taxation higher than that on other railroad companies, in consequence of the grant of lands.

2. The trust of the State of Michigan, as to the lands in question, has been executed, for they have been sold, and their proceeds applied solely to the building of the road for which they were designed.

a. The conveyance to the Flint and Pere Marquette Company was such a sale and application.

If the State had sold the lands it was first authorized to sell for money, and then passed the money over to the company under an agreement that in consideration therefor they would build twenty miles of the road, and so on with successive sections, is there a doubt that this would constitute a sale of the lands and appropriation of the proceeds in accordance with the terms of the trust? And it could make no difference if the lands had been sold to certain persons, and then the same persons had been employed to build the road for the same consideration. Nor is there any legal difference between this last case and the transaction by which the State of Michigan deeded certain lands to the Flint and Pere Marquette Company, on an agreement that they would build the contemplated road. The restrictions which were placed upon the company's power of alienation as security that they should carry out their contract, do not make the transaction any less a sale, any more than the giving of a mortgage to secure a portion of the purchase money by a grantee, affects the character of the conveyance by which he receives his title.

b. The Flint and Pere Marquette Company has sold the lands in question to complainants, and applied the proceeds to building their road. The complainants must admit, on the theory most favorable to them, that so far as the proceeds of the lands have been applied to the construction of the road, the trust of the State as to these lands is ended. Now complainants aver that the Flint & Pere Marquette Company have applied to the construction of the road two million three hundred and seventy thousand dollars, which they still owe, which they got by deeding their lands to complainants, and authorizing them to sell them from time to time, and from the proceeds pay those from whom they borrowed this amount. It is therefore certain that two million three hundred and seventy thousand dollars worth of the lands left to the Flint & Pere

Marquette Company are, on complainant's theory, justly taxable by the State, since their proceeds to this amount have been put into the road. The legal title of the lands has also passed from the company to complainants. Though it may be inferred from the statements of the bill that the company has a right to the surplus, if any, that may remain from the sale of the lands after the bonds are paid, there is no averment, direct or indirect, that there is likely to be any such surplus, or that there remains any valuable interest of the company in the lands in question. The fair inference from the facts stated in the bill, would seem to be that there is no likelihood of any such surplus, for defendants are seeking to tax only about eleven thousand acres of land, all of which is subject to the immense debt mentioned. Will it be contended, then, by complainants' counsel, that the mere possibility that there will remain a surplus for the company out of these lands, prevents them from being subject to State taxation? If such a position is correct, how easy it would have been for the company to have kept their entire land grant free from State taxation until the final completion of the road, or for a long time thereafter!

This court have recently held in two very important cases, that a large mortgage interest on the part of the United States in the Union Pacific Railroad, and a right in a certain contingency to take possession, are not inconsistent with the right of the States to tax the road.

Thompson v. Pacific Railroad, 9 Wall., 579.
Railroad Company v. Peniston, 18 Wall., 5.

Will the contingent interest of the Flint and Pere Marquette Company to the lands in question, be considered more worthy of regard?

3. The Flint and Pere Marquette Company, and complainants, as claiming under them, are estopped from denying

that the lands in question are taxable, since they received them under a conveyance which, by providing that they shall not be taxable for seven years, recognizes the right of taxation after that period.

If the company had refused to accept the grant with section seven in it, the Legislature of Michigan might have made the grant to some other party. Even though the lands were otherwise untaxable, the company had power to waive the exemption and submit to taxation, and their agreement to this effect will be enforced, unless some interest of the United States will be injuriously affected thereby. The only interest of the United States is to have the road completed; but the bill does not aver that there is the least danger that the road will not be built according to agreement, on the contrary avers that the company has kept all its agreements thus far. If the United States had any interest likely to be injuriously affected by the proposed taxation, only the United States could complain therefor. The case of Baker v. Gee, 1 Wall., 333, is an authority in point here. In this case Congress had made a grant of land to the State of Missouri, to be used in the building of a certain railroad, and for "no other purpose." The State, in accepting the grant, and conferring it upon a certain railroad company, gave a right of pre-emption at a fixed price to certain settlers. It was contended that this was beyond the power of the State, because outside of the purpose for which the lands were granted. This court held that the railroad company and those claiming under them, were estopped from setting up such a defense, and that it was a matter as to which only the United States could complain.

4. The only decisions which I have been able to find upon the point in issue, sustain the view presented.

Burlington & Missouri R. R. Co. v. Hayne, 19 Iowa, 187.

The question in this case was as to the validity of State taxation of lands granted to Iowa by the United States, and to the plaintiff by the former, under an agreement to construct a certain railroad. The case is not distinguishable from the one at the bar. The court held that the lands of the company were taxable as soon as the title vested in it. Lowe J., in giving his opinion, speaking of the lands, says: "Taxing them is neither a legal or technical division or infringement of the objects of the grant, nor a diminution thereof in the sense of the law as contended in the argument; nor does the possible reversionary interest which the government has in these lands, operate to bar the State in taxing the same. If the company fails to build the entire line of their road within the time named by the grant, it will be the uncertified lands still remaining which will revert. There is no suggestion in the bill that the lands therein described will likely revert to the government. The statement in the bill, and the argument that these lands remain yet unsold by the company, and, for that reason are untaxable, merits but little consideration. The company is not a public but a private corporation, organized for pecuniary profit, and if the land is theirs to use, to sell, to control and to enjoy, in all the methods in which individuals may use their property, what valid reason can be assigned for exempting the company's lands from the burden of taxation? I can imagine none."

In the case of the Iowa Homestead Company v. Webster County, 21 Iowa, 221, it was held that similar lands were taxable in the hands of the company as soon as they were earned.

See also the Cedar Rapids & Missouri R. R. Co. v. Woodbury County, 29 Iowa, 247.

I submit that the decree of the court below must be affirmed with costs.

C. A. KENT,

Of Counsel for the State of Michigan.

TAXING RAILROAD LANDS.

Decision of Judge Emmons in the U. S. Court—The Power of the State and Local Municipalities to Tax Affirmed.

The complainants ask an injunction to restrain the levying of a tax upon certain lands held under acts of Congress and of the State of Michigan, donating them for the construction of railroads. They are trustees for the company and for bondholders. The nature of their rights and the objections they make to the legality of the tax, will be understood without a citation or analysis of the numerous and somewhat complicated statutes on which they rely. For the purposes of this opinion it is sufficient to say that Congress donated to the State a large body of lands to aid in the construction of certain designated railroads.

The State was authorized to sell 120 sections of land for each road before any part of the road was begun, in order to raise a fund to launch the enterprise. As each division of twenty miles was completed, a like quantity was authorized to be sold. If the road was not finished within ten years, the lands unsold were to revert to the General Government. These features of the Federal legislation are all which are important in the present controversy. They authorize an appropriation of the lands to the construction of each road as divisions of it are finished, and no reverter to the General Government can take place except as to such lands as have not been so appropriated at the expiration of the ten years if the road is not then finished. The State conferred these lands upon several corporations on substantially the same terms as itself held them. The corporations had a right to sell portions of the land as they finished specified divisions of the road. Their

title became perfect when these conditions were complied with. The corporation in question, before it had acquired the right of sale, conveyed the lands to complainants as trustees to secure bonds which had been sold, and the proceeds applied to the construction of the road. The conditions required have been fulfilled, and the right of sale has attached to the lands now sought to be taxed. As to these, therefore, the end sought by Congress and the State has been accomplished. Although there was a general purpose to secure the completion of the entire road, an unlimited power of disposition was given by Congress to the State, and by it to the corporations of the lands which pertained to the specified divisions when they were completed. The intention of both sovereignties was to part irrevocably with such portions of the property as were applicable to the completed parts of the road. The lands now in question pertain to parts of the road which have been completed, and have therefore been fully earned.

It is among the familiar maxims of the law that, in order to sustain a claim to any exclusive franchise, and especially an exemption from taxation, the legislative intention to create it must be expressed in language wholly unambiguous. If the language is susceptible of two constructions that is invariably adopted which leaves the Legislature at liberty to change the law and modify the right. While we think some cases have gone too far in demanding in all instances an express exemption, we nevertheless fully concede the policy of the rule which refuses to deduce a limitation of legislative power from enactments in any degree doubtful. In *10 Howard, 385, The Philadelphia & Wilmington Railroad Company vs. Maryland*, Chief Justice Taney delivering the opinion of the Court, says thus: "This Court on several occasions has held that the taxing power of a State is never presumed to be relinquished unless the intention to relinquish is declared in clear and unambiguous terms." See also *Providence Bank vs. Billings, 4 Pet. 514; Charles River Bridge vs. Warren Bridge, 11 Pet.*

East Saginaw Manufacturing Company vs. East Saginaw, 19 Mich. 259.

between the State and the corporation that the trust should not be violated, and that a tax upon the lands before they are *actually sold* is a violation of the agreement. The conveyance by the State to a corporation and by it to trustees, the sale of bonds and appropriation of the proceeds to the construction of the road, it is argued, do not constitute a sale of the lands within the meaning of the act of Congress. Thus far, it will be seen that each proposition rests upon the assumption that the lands in question are *unsold*, and remain subject to revert to the United States, if the whole road is not completed within the designated time. It is conceded that after they are sold within the meaning of the act of Congress, they are protected from taxation by neither of these propositions. (4.) It is further argued that by the 20th section of the act which conferred the lands upon the company, a specific tax was imposed which was declared to be in "lieu of all other taxes to be imposed within this State," and that the tax upon these lands is a violation of the contract contained in this provision. (5.) That by the Constitution of the State of Michigan no taxes other than specific ones can be assessed upon these corporations.

The first three propositions which in different forms object to the tax because the lands are "unsold" are sufficiently answered by deciding that within the meaning of the act of Congress and the legislation of the State, the disposition of the lands already made constitutes a sale. We are dealing with statutes which regulate rights between sovereign powers enforceable to no judicial tribunals for the execution of the political trusts which they create. It would be most unenlightened interpretation to seek the intention of these laws in narrow technical definitions instead of in the acts and consequences contemplated in their passage. Although it would not be difficult to find numerous instances in the law where analogous transactions have been adjudged to be strict fulfillments of powers of sale under wills, deeds of trust and even statutes,

we prefer to rest our judgment upon the broader ground that whenever the State in any mode has caused divisions of the road to be built, either with means derived directly from a pledge of the lands, or from the proceeds of a future sale, although it continues to hold the title, this constitutes such an appropriation to the uses of the trust as would prevent reversion to the United States, and constitutes within the meaning of the act a sale. What the General Government intended has been accomplished. The act has been done which under the statute vested the power of sale. Upon every principle of common reason and technical law, beneficiaries who have advanced money upon the faith of a title to be subsequently created by the execution of the trust would have a right to its enforcement were the parties amenable to judicial proceedings. It is not material, therefore, to our judgment, that the State has gone through the form of selling or transferring these lands to the corporation in such mode as to cause an absolute title to vest in it as divisions of the road are made, that the corporation has again sold or conveyed the lands to trustees with covenants of warranty, so that as the title vests in the grantor by the performance of the conditions, it enures to the benefit of the grantee, and that money has been obtained upon the faith of this title for the construction of the road. This does, however, enable us to find in the transactions that which a literal narrow reading of the statute, such as complainants insist upon, demands, but which we hold to be unnecessary. These forms and the acts which have been done under them would upon the most technical construction of the statute constitute a sale of the lands. That the corporation might have sold them absolutely is fully conceded and need not be argued.

A power of sale to raise money is well executed by the creation of a mortgage for that purpose. (*Sugden on Powers*, 5th ed., 116; *Ex parte Hanks*, 3 P. Williams, 9; *Williams vs. Woodward*, 2 Wend., 492.)

A party entitled to the proceeds of land under a deed of trust or a will may take the lands himself and forbid the sale, and especially he may retain the title if in any mode however accidental he has become clothed with it. (*Reed vs. Underhill, 12 Barb., 117; 2 Story's Equity Jurisprudence, Sec. 793.*)

We can conceive of nothing more useless in fact or at war with technical principle than to hold that this corporation seized in fee to its own use is not the owner of this land. Both at law and in equity he is the absolute owner of the land who has the complete power of disposition and is accountable to no one for the proceeds. It is indifferent what guards the State may have set up through boards of control or other officer to secure the performance of conditions. When they have all been performed, the trust of the State completely executed, the control of the Federal Government terminated, and the right of disposition in the corporation is complete, the latter sustains those relations to the property which for all time have been described by the term owner. If such laws have been passed and such things have been done as have eventuated in the transfer of the title from the Federal Government to the State, and from it to the corporation, the lands are sold by it to the latter within the meaning of the act of Congress. That this is the proper reading of these laws is proved by the amendment of 1871, which provides that there shall be no reverter of lands to which the right of sale has attached. The whole legislation shows that there was no intention to grant an additional right in this regard to the railroad company, and it is evident that the word "unsold" in the original act was intended to describe the same conditions and relations as the words "to which the right of sale has not attached" do in the last act. When the latter was passed the lands had been transferred to the railroad company, and Congress recognizing this conditional sale by the State, used language appropriate to continue in the altered condition of the property the right originally conferred.

The view that the lands conveyed to complainants, and to which the right of sale has attached, are sold within the meaning of the act of Congress, is one of which they should not complain, since it is the only view which would have made their security good when taken, in view of the possibility that the road might not be completed within the time limited.

The fourth and fifth propositions, that it is unconstitutional to tax the corporation other than by a specific tax, and that the State has entered into a contract that it would not do so, are both answered, if it appears that neither the constitutional provision, nor the twentieth section relied upon, applies to the property in question. Exemptions similar to that relied upon in this statute have been frequently adjudged to apply only to property which is used by a corporation in the performance of its public duties, and not to include that held for general purposes of investment or profit. If what we by no means think true were conceded, that the constitutional provision permitting specific taxation of corporations is mandatory, and that they can be taxed in no other way, we are entirely clear that it would apply only to the same kind of property. If lands are held by a railroad company, not for the purposes of a road bed, station-houses, or other objects connected with their public duties, but for the purposes of sale, as a natural person would hold them, they do not come within the provision of the Constitution or of the statute authorizing the specific taxation of the general property of the corporation, and may be taxed like the property of the citizen. In support of this position the cases are numerous and uniform.

33 Vt., 193., The Vermont Central Railroad Company vs. The Town of Burlington. In this case the charter of the company provided: "The stock, property, and effects of the company shall be exempt from all taxes levied by or under the authority of this State." The property in controversy had been purchased because supposed to be necessary for the uses of the company, but was not thus actually used. It was held

not to come within the exemption. The court, after a full review of the authorities, say "that all this class of exemptions intend to include only that property which the company is authorized to acquire by proceedings for condemnation, and which it holds in trust as a political agency for public purposes." The same doctrine is pointedly held in *The Inhabitants of Worcester vs. The Western Railroad Corporation* (4 Met., 564). In *The State vs. Newark* (1 Dutcher, 315), it it is said in reference to the taxation of a railroad company whose charter provided that a certain tax should be paid upon its capital stock, and "that no other or further tax or imposition shall be levied or imposed upon the said company," that lands purchased by the company, and which at some future time might be required for its legitimate purposes, but which at the time of the imposition of the tax were not in such use, are not within the provision cited, and that they are subject to taxation like any other property, notwithstanding this may lead to double taxation. In *The State vs. Flavell and Fredericks* (4 Zabriskie, 370), the charter of the society for establishing useful manufactures provided "that all the lands, tenements, hereditaments, goods and chattels to the said society belonging shall be, and they are hereby declared to be, exempt from all taxes, charges, and impositions whatsoever, under the authority of this State, whether for State or county uses, or for any other use whatsoever, provided always that the said exemption shall not be construed to extend to the private or separate property of any member of the said corporation in his or her individual capacity."

The proviso that the exemption should not extend to the private property of the shareholders raised a very strong inference that it did extend to all the property held by the corporation, of every description. But it was held that lands not held for corporation purposes were not within the exemption. It is unnecessary to analyze other judgments. They abundantly sustain the rule that an exemption of a corporation

from general taxation in never so comprehensive language will be construed to include only that property which is necessarily employed by the corporation to carry out the public purposes of its charter. See also, *Railroad Company vs. Berks County, 6 Barr, 70; Wilmington Railroad vs. Reid, 13 Wallace, 268; Lehigh Navigation Company vs. Northampton, 8 Watts and Sag., 334; Proprietors, etc., vs. Lowell, 1 Met., 538; State vs. Mansfield, 3 Zabriskie, 510; Gardner vs. The State, 1 Zabriskie, 557.*

This rule is but an application of the more general one so firmly established in both the Federal and the State tribunals, that all grants of franchises and exemptions from the common political burdens shall receive the narrowest construction wherever in the least degree ambiguous.

In a case where the clause relied upon has for many years received a judicial construction wholly at war with that claimed, it is sufficient to refer to such construction as an answer to the claim. It would, however, be unjust to the State not to mention the clear assertion of a power to tax these lands contained in the seventh section of the same act which contains the contract relied upon. It is there provided that they shall not be liable to taxation for seven years, unless sold or improved. The implication is irresistible that after that period they may be taxed, though still held by the company, and at any time when sold or improved. These very lands, which, it is argued, the Legislature intended wholly to exempt from everything but specific taxation while in the hands of the company, are asserted to be the subject of general tax if at any time the company improves them even without sale. That the Legislature quite understood the settled construction which had been given to the clause in reference to specific taxation in section 20, is clearly shown by the provisions of section seven.

Although we have no doubt, upon principle, of the correctness of our judgment, we are glad to find it fully sustained by

several decisions of the Supreme Court of Iowa, under a state of facts substantially identical.

(*The Burlington & Missouri Railroad Company vs. Hayne, 19 Iowa, 137; Iowa Homestead Company vs. Webster County, 21 Iowa, 221; The Cedar Rapids & Missouri Railroad Company vs. Woodbury County, 29 Iowa, 247.*)

The views we have expressed render unnecessary the consideration of many subordinate arguments presented at the bar in favor of complainant's main proposition. None of them have been overlooked, but the condition of the judge who prepares this opinion, he being compelled through weakness of eyesight to work only through the assistance of others, renders a more extended discussion impossible.

On the argument of the case certain preliminary questions were raised, but not fully argued, as to the union of all the defendants in one suit, as to the power of a court of equity to enjoin the defendants at so early a stage in the proceedings for taxation, and as to the sufficiency of the averments of the bill to show probable injury to complainants or the bondholders.

In the view we have taken of the case, a decision of these questions is not material, and hence they are not decided.

Longyear, J., concurred in the result.

UNITED STATES OF AMERICA.

IN THE SUPREME COURT

OF THE

UNITED STATES.

October Term, 1874.

CHARLES R. TUCKER *et al.*,
Complainants and Appellants,

vs.

NELSON FERGUSON, DEFENDANTS, *et al.*,
Defendants and Appellees.

ISAAC MARSTON,
Of Counsel for the State of Michigan.

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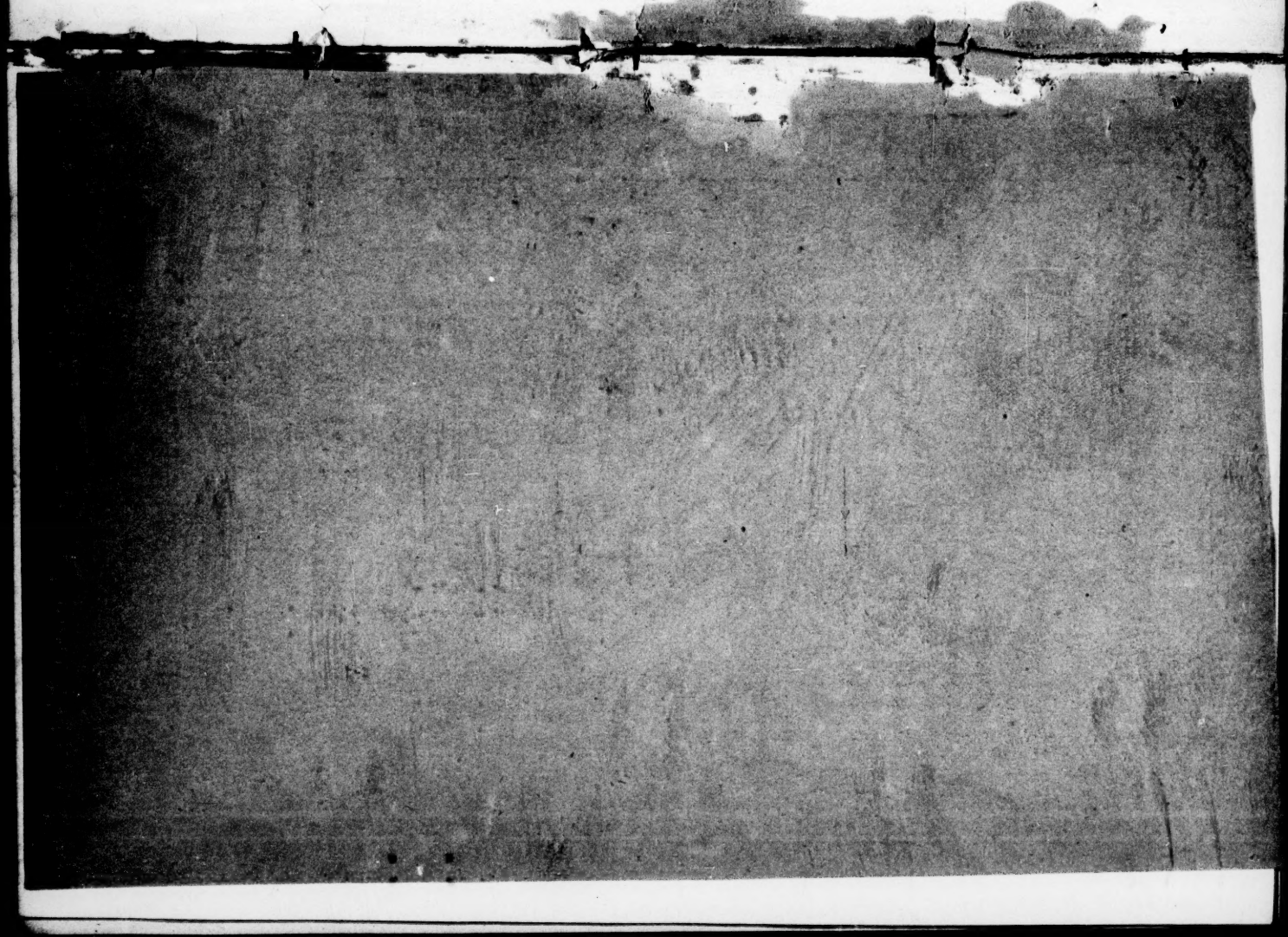


UNITED STATES SUPREME COURT.

CHARLES R. TUCKER, *et al.*,
Complainants and Appellants,
vs.
NELSON FERGUSON, *et al.*,
Defendants and Appellees.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MICHIGAN, IN CHANCERY.

BRIEF FOR DEFENDANTS.

The defendants, acting as supervisors of their several townships in the county of Osceola, and State of Michigan, under an act of the Legislature of said State, approved April 19, 1873, made out their assessment rolls, and listed the lands described in the bill of complaint for assessment, upon which to apportion and extend the general State, county, and township taxes for the year 1873.

Complainants, as trustees, file their bill of complaint, and ask for a perpetual injunction to restrain the defendants from so apportioning or extending any taxes for 1873, for such purposes, upon or against any of the lands described in the bill.

Involving, as this question does, the right and power of the State to subject the lands in question to taxation, the State assumes the defense, waiving all incidental and minor questions which might in this case be raised.

It will only be necessary, therefore, to refer to such portions of the bill as present this question.

The bill of complaint sets forth that the Flint and Pere Marquette Railway Company,—a corporation,—was formed prior to the 14th day of February, 1857, under an act of said State, approved February 12th, 1855, entitled "An act to provide for the incorporation of railroad companies," and has continued in existence as a corporation to the time of filing said bill.

That by act of Congress, approved June 3, 1856, entitled "An act making a grant of alternate sections of the public lands in the State of Michigan, to aid in the construction of certain railroads in said State, and for other purposes;" and by act of the Legislature of the State of Michigan, approved Febrnary 14th, 1857, the lands in question, with others, were granted to, conferred upon, and vested fully and completely in said railway company, to aid in the construction of its road.

That by the terms of said act of February 14, 1857, it was among other things provided, that the lands conferred upon said railway company should be exclusively applied in the construction of its railroad, and should be applied to no other purpose whatever.

That said State, afterwards, passed several other acts relating to the subject matter of said land grant, and for the benefit of said company.

That said company, after accepting said grant, proceeded with the construction of its railroad, and that in December, 1871, there had been one hundred and twenty miles of its road completed, accepted and certified to by the Governor of said State, in accordance with such legislation, and that at the time of filing said bill, there remained about forty-eight miles of its road to be completed.

That if defendants are permitted to extend taxes upon these lands, the same will by the statutes of Michigan become a

prima facie lien upon the lands so assessed, and a cloud upon the title.

That by the legislation in said bill referred to, and the construction by said company of its railroad as stated, an irrevocable contract was made that said lands included in said land grant, and including those described in the bill, while they remained unsold, should be held free from local taxation, and that the State is prohibited by that clause of the Constitution of the United States, prohibiting States from passing laws impairing the obligation of contracts, from passing any act authorizing the taxation of said lands.

But even if this conclusion is not correct, then complainants claim that by the terms of the act of 1871, of said State, a grant of an exemption of such lands from local taxation was made, except such as are or may be opposite and coterminous with the constructed portion of its road; that no such lands should be subject to taxation until after the expiration of three years from April 1, 1871, nor until after three years from the date of the certificate showing that such lands had been earned; and that the land opposite and coterminous with the line then in operation should be subject to taxation in two years from April 1st, 1871, and that none of these lands came within this last exception;

That by the Constitution of said State, which was in force in 1856 and still continues in force, it was provided that the Legislature should provide a uniform rule of taxation, except on property paying specific taxes.

That the Legislature might provide for the collection of specific taxes from railroad and other corporations thereafter created, and also appropriating such specific taxes for educational purposes.

That this company has been assessed, and has paid each year a specific tax, levied and collected under the laws of said State, and that a large amount was paid for the tax assessed under § 3, Act 3, of the General Railroad Law of 1873.

That under and in accordance with the Constitution of said State, the property of railway companies therein is liable to specific taxation only, and that it is not competent for the Legislature of said State to change the manner and mode of taxation in respect to such property.

That the title taken by the State under said act of Congress, was taken in trust for the specific purpose in said act named; that the State was authorized to dispose of said lands only to aid in the construction of railroads for which the same were granted, and for no other purpose, and that it is in violation of the trust thus created, for the State to assume to derive a revenue from said lands before the same shall have been sold by the company to which the same were granted.

It will thus be seen that three questions of very grave importance are raised in this case.

First—That by the acts of Congress and of the Legislature of said State, and the construction by said company of its railroad as stated, *an irrevocable contract was made*, between the company and said State, that the lands described in said bill, while they remained unsold by the company, should be held free from local taxation.

Second—That under the act of 1871, these lands would not be subject to taxation until after the expiration of three years from April 1, 1871, even admitting the first proposition not to be correct.

Third—That under Article XIV of the Constitution of said State, relating to specific taxes the property of railroad companies is liable to specific taxation only, and that the Legislature could not therefore authorize the taxation of the lands in question in the manner attempted in this case.

The other questions raised grow out of and are dependent upon some one of the above propositions.

I shall therefore discuss these questions in the order named.

I.

THAT BY THE ACTS OF CONGRESS AND OF THE LEGISLATURE OF THE STATE OF MICHIGAN, AND THE CONSTRUCTION BY SAID COMPANY OF ITS RAILROAD AS STATED, AN IRREVOCABLE CONTRACT WAS MADE BETWEEN THE COMPANY AND STATE, THAT THE LANDS DESCRIBED IN SAID BILL, WHILE THEY REMAINED UNSOLD SHOULD BE HELD FREE FROM LOCAL TAXATION.

This is rather a startling proposition when we consider the vast quantity of land in Michigan granted to corporations under similar statutes, and yet unsold; although owned in fee by the companies.

Conceding that a State might by legislation make an irrevocable contract with a corporation exempting property owned and held by it from taxation, let us ascertain what has actually been done in this case.

Of course it will not do to say, generally, that under the legislation of the State of Michigan and the acts of the company, such a contract was formed or entered into. Complainants must be able to point out the specific statute, section and clause, which thus binds the State.

These lands were by the State granted to the Flint and Pere Marquette Railway Company by act No. 126 of the laws of 1857.—*Sess. Laws 1857, p. 346.* It is this act and the acceptance by the company of the lands, franchises, etc., by that act conferred, as required by § 5, which it is claimed constitute the contract, "That it was the *intention* of the Legislature when this act was passed, and of the company in accepting its terms, that the lands should not be subject to taxation prior to the final completion of the road."

This *intention* is not found in express terms exempting these lands, but is gathered from the general object and purpose of the act, viz:

The Legislature of Michigan by the act approved February 14, 1857, accepted the grant made by the act of Congress,

"with the restrictions, and upon the terms and conditions contained in said act of Congress," and the Legislature by the same act, conferred the lands, franchises, etc., upon the railway company, subject to all the conditions, restrictions and obligations imposed upon said company by that act, which were as follows:

First. The lands were to be exclusively applied in the construction of its railroad, "and said lands shall be applied to no other purposes whatsoever."—*Sec. 3.*

This was but following one of the provisions contained in the first section of the act of Congress granting these lands to the State.

Can this clause receive the construction contended for by complainant? viz.: That the power to levy a tax, pre-supposes the power of the State to sell the lands taxed for non-payment thereof, which would prevent the lands being applied exclusively to the construction of its road, thus defeating the purpose of Congress and of the Legislature as expressed in this clause.

Does this clause prevent the company after it has the Governor's certificate,—entitling it to sell one hundred and twenty sections of land,—from using the proceeds thereof for any purpose it may deem proper?

Does it impose upon the company a legal duty to use the proceeds for the purpose of extending its road, and for no other purpose?

Suppose the company refuses to use the proceeds arising from such sale in constructing its road, can the government interfere and compel it to use them for that purpose?

These questions must all be answered in the negative, even although such answer concedes that the company by so doing is as clearly defeating the purpose of Congress and the Legislature, as in permitting a sale of those lands for taxes.

Suppose the company use such proceeds for an illegitimate purpose, could the government interfere? Clearly not, although the stockholders might.

It may be said, this cannot be presumed; that the presumption is, the company will use the proceeds at least for legal purposes. True. So it is equally presumed that the company will pay all legal taxes assessed against its lands, and thus prevent a sale and diversion of them from the objects and purpose contemplated by Congress and the Legislature.

The Supreme Court of Iowa, in construing similar legislation with reference to the taxation of lands, in *The Burlington & Mo. River R. R. Co. vs. Hayne, 19 Iowa, 142*, in a case where the lands were assessed after the company had earned them and obtained the requisite certificate, in answer to a similar objection, after saying that the lands were subject to taxation, said: "And this for the reason that then they would *be free to do as they pleased with said lands, sell, mortgage, use, or otherwise dispose of them, exercising all the acts of ownership over them, as fully and to the same extent as any other proprietor might or could do with his own property.*"

* * * "It is plain from the terms of the trust, and the nature and mode of its exactions, that the conditions which will entitle the companies to these lands must and will be performed by stages or given periods, and, hence, a complete title and livery of seizin will come to them by stages or given periods, at which time only, we suppose, will they have a taxable interest in the same." Again, after saying that the lands have vested in the company, the court proceeds:

"Then why not taxable? They do not fall within any of the exemptions named in the statutes. *Taxing them is neither a legal or technical diversion or infringement of the objects of the grant, nor a diminution thereof, in the sense of the law, as contended for in the argument; nor does the possible contingent reversionary interest which the government may have in these lands, operate to bar the State in taxing the same.* If the company fails to build the entire line of their road within the time named by the grant, it will only be the uncertified lands still remaining which will revert. There is no suggestion in

the bill that the lands therein described will likely revert to the government. The statement in the bill and in the argument that these lands remain yet unsold by the company, and for that reason are not taxable, merits but little consideration. The company is not a public but a private corporation, organized for pecuniary profit, and if the land is theirs to use, to sell, to control, and to enjoy in all the methods which individuals may use their property, what valid reason can be assigned for exempting the company's lands from the burden of taxation? I can imagine none."

The doctrine here recognized and so clearly laid down, very effectually disposes of the position that taxation of these lands would be contrary to the general tenor of the act of Congress, or that it would defeat the object which Congress had in view in making the grant.

It is clear, therefore, that the clause in the act of Congress, and in the act of the Legislature of Michigan, providing that these lands shall be exclusively applied in the construction of the railroad, and shall be applied to no other purpose whatsoever,—does not prevent the Legislature from subjecting them to taxation.

Second. This railroad was to be and forever remain a public highway for the use of the Government of the United States, free from toll or other charge upon the transportation of any property or troops of the United States.—*Sec. 4.*

This also was following section three of the act of Congress.

The remarks made in reference to the previous clause are equally applicable here.

In *Thompson vs. Pacific Railroad, 9 Wall., 579*, a bill was filed to restrain the collection of certain taxes.

The Union Pacific Railway Company, Eastern Division, was incorporated under the laws of Kansas. To this and to several

other roads "large grants of land were made, and large subsidies engaged on the security of a second mortgage, upon the condition of paying, at maturity, the bonds advanced by way of subsidy, and of rendering certain services to the government in the transmission of messages, and in the transportation of mails, troops, munitions, and other property, at reasonable rates of compensation."

The Legislature of Kansas having passed a law laying certain taxes upon the property of the company, Thompson and others filed their bill, setting forth among other things, that the treasurers of certain counties were proceeding to collect the taxes: that the property of the company was mortgaged to the United States; that the company was bound to perform certain duties, and ultimately to pay five per cent of its net earnings to the United States, and that the company would be greatly hindred and embarrassed in the performance of its duties and obligation to the United States, if the taxes imposed should be collected.

The CHIEF JUSTICE, in delivering the opinion of the court, said:

"It was suggested, rather than argued, by one of them (counsel), that the property of the State is exempt by the State constitution from taxation; and that the State, having reserved to itself in the charter the right to purchase the road at the end of fifty years at a valuation then to be made, upon two years' notice to the company, has, therefore, a property in the road which cannot be taxed. But it is too plain for argument that the interest thus reserved is too remote and too contingent to be regarded as within the meaning of the exception.

"The main argument for the complainants, however, is that the road, being constructed under the direction and authority of Congress, for the uses and purposes of the United States, and being a part of a system of roads thus constructed, is therefore exempt from taxation under State authority. It is

to be observed that the exemption is not claimed under any act of Congress. It is not asserted that any act declaring such exemption has ever received the sanction of the National Legislature.

"*But it is earnestly insisted that the right of exemption arises from the relations of the road to the General Government.* It is urged that the aids granted by Congress to the road, were granted in the exercise of its constitutional powers, to regulate commerce, to establish post offices, and post roads, to raise and support armies, and to suppress insurrection and invasion; and that by the legislation which supplied aid, required security, imposed duties, and finally exacted, upon a certain contingency, a percentage of income, the road was adopted as an instrument of the government, and as such was not subject to taxation by the State."

But the court refused to follow this argument, and said:

"No one questions that the power to tax all property, business, and persons, within their respective limits, is original in the States and has never been surrendered. It cannot be so used, indeed, as to defeat or hinder the operations of the National Government; but it will be safe to conclude, in general, in reference to persons and State corporations employed in government service, that when Congress has not interposed to protect their property from State taxation, such taxation is not obnoxious to that objection."

Third. If the company fails to complete its road within the time limited, the Board of Control is to declare the lands so far as they have not been sold in good faith, forfeited to the State.—*Sec. 11.*

So far as this clause goes it is an argument against the complainant. It forfeits the unsold lands, and it authorizes the board to confer such lands upon some other competent party.

This, however, does not mean some other competent party or corporation to complete the same road,—because, although the company may forfeit the unsold lands, it does not forfeit

the completed portion of its road, or the right to complete the balance in accordance with its charter. Yet, the effect of so conferring the unsold lands upon some other party or corporation, would be to defeat some of the other provisions.

The fourth section of the act of Congress of June 3, 1856, provided that if any of the roads were not completed within ten years, no further sales should be made, and the lands unsold should revert to the United States.

Here clearly is a clause which defeats the above provisions, so far as a completion of the road from the proceeds of these lands is concerned.

This clause was, however, by the act of Congress of March 3d, 1871, amended so that only the lands included in the grant to which the right to sell should not have attached upon the 3d day of March, 1876 (the date of forfeiture), should revert to the United States.

So that any possible argument which could be drawn from the fact that a sale of the lands for taxes would defeat the reversion to the United States under the original act, has by this amendment been swept away. Most of these provisions which it is claimed show an intention not to tax these lands, or that are inconsistent with such an intention, are found in and taken from the act of Congress granting these lands to the State.

Now it is very clear that Congress, in using such language, could by no possibility have supposed it applicable to questions of taxation in any manner, neither as permitting or prohibiting taxation. Congress contemplated that the State would retain the title and sell these lands, in which case the question of taxation would not arise.

Will the same language when found in an act of a State Legislature, then, be construed into something different than it would be when found in an act of Congress? Did not the Legislature of Michigan adopt the language found in the act of Congress, having the same object in view which Congress

had? Clearly so. If, then, the language used by Congress had no reference to taxation, neither did it when used by the Legislature of the State of Michigan. *Exemption from taxation will never be declared by construction or implication; it must appear in clear and express terms.*

The Supreme Court of Missouri, in discussing a similar question, says:

"The act does not pretend to grant exemption from taxation in express terms, and the courts will never presume or infer that the State intends to abandon or surrender the important right of taxation. Whatever restrictions may have been imposed by the adjudications of the national tribunals on the sovereign rights of the States to exercise this vital power of taxation untrammelled, in cases where the State had parted with the right for a valuable consideration, *yet all the courts proclaim that the abandonment of the right can never be presumed; that the intention to abandon must appear in the most clear and unequivocal terms.* * * * The act of incorporation was silent on the subject of taxation; and where that was the case, unless there was some contract to be impaired, where there was a consideration given, it would never be presumed that the Legislature had divested itself of the high attributes of sovereignty, the power to tax. The surrender of such an important prerogative was not to be deduced by implication."

Equally clear is the language of the Supreme Court of Michigan, in *East Saginaw Manufacturing Co. vs. The City of East Saginaw et al., 19 Mich., 279.* See, also, *Gilman vs. City of Cheboygan, 2 Black, 513,* where SWAYNE, J., in delivering the opinion of this court, says: "Admitting that the State could enter into such an engagement, there is no evidence that it did. *This fact should never be assumed unless the language used be too clear to admit of a doubt.*"

Or as was said by J. FIELD in the case of *The Delaware Railroad Tax, 18 Wall., 225,* in speaking of exemptions:

"But before any such exemption or limitation can be admitted, the intent of the Legislature to confer the immunity or prescribe the limitation must be clear beyond a reasonable doubt. All public grants are strictly construed. Nothing can be taken against the State by presumption or inference. The established rule of construction in such cases is that rights, privileges, and immunities not expressly granted are reserved. There is no safety to the public interest in any other rule. And with special force does the principle upon which this rule rests apply when the right, privilege, or immunity claimed calls for any abridgement of the powers of the government, or any restraint upon their exercise. The power of taxation is an attribute of sovereignty, and is essential to every independent government. As this court has said, the whole community is interested in retaining it undiminished, and has a right to insist that its abandonment ought not to be presumed in a case in which the deliberate purpose of the State to abandon it does not appear."

In this case, however, it is not claimed that there is any clear definite exemption,—but that such exemption comes from a construction of the general tenor and object of the act.

Let us look at some of the facts in this case.

What are the facts in this case? Congress, in June, 1856, granted to the State of Michigan certain lands to aid in the construction of a railroad from Grand Haven and Pere Marquette to Flint, and from thence to Port Huron.

The act of Congress did not mention or designate any company by name as being entitled to the benefit of this grant. It was left entirely to the Legislature.

The Flint & Pere Marquette Railway Company was formed prior to the 14th day of February, 1857, "for the purpose of

constructing, operating, and maintaining a railroad within the State of Michigan, from the city of Flint, in the county of Genesee, northerly and westerly to Pere Marquette, on Lake Michigan."

The Legislature of Michigan was not obliged to confer the grant upon this company,—the grant by Congress was to construct a railroad *from Grand Haven and Pere Marquette to Flint, and thence to Port Huron.* This corporation was not formed for that purpose. Indeed, it is not alleged, nor does it appear, that this company was formed in view of, or on account of the act of Congress referred to, or even after the passage of this act.

The company, according to its charter, was to construct, operate, and maintain a railroad from Flint to Pere Marquette. As a corporation, it became and was its duty so to do. Afterwards, the Legislature to aid it, in thus doing what it had previously undertaken and agreed to do,—indeed, was incorporated to do,—granted to and conferred upon it these lands.

The grant to this company was in the nature of a bonus, a reward, an assistance to the company for doing in a certain manner, and within a certain time, what it had already agreed to do.

Under this legislation, the lands thus granted to the company would, upon the completion and acceptance of any portion of its road, entitling it to sell the same, have become liable to taxation. At all events, the State could at any time, have made all such lands subject to taxation.

Understanding this fact, and as an additional bonus to the company, the State provided that none of the lands so granted should be liable to taxation for seven years from the first day of September next following. And the company was by this act required to complete its road within seven years from the fifteenth November next following. In other words, the company was given seven years to construct its road, and during all that time, none of its lands, so long as owned by it, were to be taxed.

Now it is claimed, *that independent of this clause, from the general tenor of the act*, these lands could not be subjected to taxation as such might defeat the purposes of the act of Congress, and that such was the understanding and intention of the Legislature.

In other words, that under the act of Congress and of the Legislature, these lands from the very nature, object, and purpose of the grant, were exempt from taxation until the completion of the road.

If this is true, what was the object and purpose of the Legislature in *expressly* exempting these lands for seven years, if without this, they were *impliedly* exempted for the same time, or while the road was being constructed?

The construction which complainants seek to give the act, independent of this express exemption, would render this clause superfluous and unnecessary.

Such a construction cannot be given to the act without violating the plainest principles of law. Effect must be given to every part of the act, and we cannot attribute to the Legislature the folly of expressly providing in an act that certain property should be exempt from taxation, if from the same act, without such a provision, the property would have been so exempt.

This clause expressly exempting the property serves another useful purpose in the construction of this act. It shows that the Legislature had this question under consideration, and did not consider the property would be exempt from taxation independent of such a provision, thus effectually disposing of the argument advanced by complainant.

In case the company sold any of these lands, *or in case it improved any of them* at any time, even within the period of seven years, then the lands so sold *or improved* became subject to taxation.

This entire act, interpreted according to well settled rules, clearly shows that after the expiration of seven years these lands should become subject to taxation.

BUT IF THIS STATUTE CAN BE CONSTRUED AS EXEMPTING THESE LANDS WHILE HELD BY THE COMPANY, UNTIL THE FINAL COMPLETION OF THE RAILROAD, THEN WE DENY THE POWER OF THE LEGISLATURE TO PASS SUCH A LAW.

Before discussing this proposition it might be well to ascertain what title the company has in these lands.

The construction of these acts came up in Michigan and was passed upon by the Supreme Court of that State, in *Johnson vs. Ballou, 28 Mich., 379.* The opinion was delivered by COOLEY, J., who, after quoting from the act of Congress of June 3d, 1856, says:

"It becomes of importance to the parties to determine whether this act of Congress constituted a present grant of the lands included within its terms, to take effect on their selection when earned, or whether on the other hand it conferred upon the State of Michigan merely a power which, when it came to be exercised in behalf of the intended beneficiaries would require further action, either by way of the issue of a patent, or of some equivalent act to perfect in the beneficiary a title to the land earned. The plaintiff insists that the title passed to the State, while the defendant disputes this, and claims that the title never passed from the United States until the lands earned were patented to the Jackson, Lansing, and Saginaw Railroad Company, as hereinafter stated.

"It will be observed that the phraseology of the act of 1856 imports a conveyance to the State, and not the creation of a power merely. The words are 'that there be and is hereby granted,' etc. And further on the lands *granted* are repeatedly spoken of, and it is provided when and what contingency they shall revert to the United States. While this phraseology would not be conclusive, if from other portions of the act it plainly appeared that the purpose was only to confer power; yet it must be confessed that one who insists that an act of the government which employs the operative words of present conveyance, with provision of forfeiture on breach of condi-

tion, was intended to confer an authority only, is called upon to point out when and in what words the intent he insists upon is found expressed.

"The defendant relies upon the manifest purpose of the act to give to the State a power in trust only; a purpose which he thinks is apparent in all its provisions, and which was found in a similar act by the federal Supreme Court, in *Rice vs. Railroad Co., 1 Black, 377.*

"The case of Black differs from the one before the court, in the important particular that the act there under discussion expressly provides that no title should vest in the territory of Minnesota, the grantee therein named, until the condition of the act had been complied with. That explicit declaration would seem to remove from the case all ambiguity and all question; and though it is true the learned judge who delivered the opinion in that case, employs in some parts of it, language sufficiently general, if considered by itself and without the context, to support the views of the defense, yet we cannot discover the negative declaration we have referred to was at any time absent from his mind as a controlling feature of the case, nor can we satisfy ourselves that the conclusion would have been the same if that declaration had been wanting.

On the other hand, the opinion in the office of the Attorney General has been uniform, that an act of the nature of the one under consideration is a grant *in presenti*. This was the advice of Attorney General Cushing to the Secretary of the Interior, under an act almost precisely identical with this (8 Op. of Attorney General, 244), and this advice was reiterated by his successor, Judge Black, (11 Ib., 49); see, also, 8 Op. of Attorney General, 247, 255; 9 Ib., 41; also, Kissell v. St. Louis Public Schools, 18 How., 19; Railroad Co. v. Tremont Co., 9 Wall., 94. These opinions of very eminent lawyers are worthy of high consideration, especially, as when giving them they were the official advisers of the government, and their advice was accepted and acted upon by the Depart-

ment of the Interior. The government has thus given a practical construction to its own grants, which the State authorities should accept and follow, unless it is found that the proper judicial authority of the federal government has reviewed and found it erroneous, which it is not pretended is the case, unless by the decision in *1 Black* above referred to. And we have already said we find that case to furnish no distinct support to defendants' position.

No court is at liberty to subject these sovereign legislative grants, which more partake of the nature of treaty cessions by the Union to one of its members than of individual bargaining, to the definitions and refinements which the rules of municipal law apply to the grants and conveyances from man to man. When the government conveys, by act of Congress, that which constitutes its deed at the same time constitutes the law which defines the right or estate, and stamps it with whatever character it possesses; and so long as the government is only dealing with its own, the right or estate granted, whether anomalous or unprecedented, or otherwise, will be entitled to recognition and effect for just what it appears and was intended to be.—*Ballou v. O'Brien, 26 Mich., 304.*

It is unnecessary that the grant should be capable of being brought within any of the definitions given to estates by the common law. The one here examined seems to have been intended as a present conditional bounty to the State to encourage the building of railroads, and to become absolute and to attach to specific lands when the terms of the donation should be complied with. To devote the lands to this specific purpose, and work a transfer of the title, no further conveyance by the federal government was contemplated; it is assumed that a transfer of title was absolutely involved in the act itself and what should be done under it, and moreover that precautionary provisions were needed to meet the contingency of non-performance of the condition, and bring back the title to federal government.

The State, then, had the title, though of course it was a floating title, not attaching to any particular parcels until the proper action should be had under the congressional grant to entitle some intended beneficiary to select and convey them.—*Rutherford v. Green's heirs, 2 Wheaton, 196.* On the 14th day of February, 1857, the Legislature passed an act which, referring to the grant by Congress, declared that so much of the lands, franchises, rights, powers, and privileges as were or may be granted and conferred in pursuance thereof to aid in the construction of a railroad from Amboy, by way of Lansing, to some point on or near Traverse Bay, "are hereby disposed of, granted to, conferred upon and vested in the Amboy, Lansing, & Traverse Bay Railroad Company."

Again after speaking of the issuing of the certificate by the Governor, the court proceeds as follows:

"This certificate would seem to entitle the company to make sale of the second one hundred and twenty sections of land, unless some action was required of the public authorities in order to determine what lands should be sold, or of the company in selecting them. The defendant insists that there must have been a designation by or under the authority of the State, before the floating right could attach to specific descriptions. That might be true if the right of selection was in the State; but such does not seem to be the case. The company having become entitled to two hundred and forty sections of land, might take one hundred and twenty sections thereof within any continuous length of twenty miles of their road, and the other one hundred and twenty sections within any other continuous length of twenty miles thereof, and the State could not force selections upon it. And as no legislation required any particular form or method of selection, when the proper quantity of public land was found within the requisite distance of the road, we are unable to perceive why a sale by the company of specific parcels of land, not exceeding the quantity earned, and lying within the limits specified in the grant, would not, to that extent, have been an effectual selection."

The Supreme Court of Iowa, in *Courtright vs. The Cedar Rapids and Missouri River Railroad Co., 35 Iowa, 399,* already referred to, says:

"The act of Congress granting the lands to the State, and the State law conferring them upon the Iowa Central Air Line R. R. Co., was sufficient after selection provided for to pass the title and vest it in the railroad corporation without any further assurances. The legislative act of the sovereign power is just as effective for that purpose as could be any formal conveyance executed by its officers. And so it has been repeatedly held. Laws of Congress and of the States, treaties, and grants by the proper authorities, have been held sufficient evidence of titles without other assurances." Citing *Lissieur et al. vs. Price, 12 How., 59; Rutherford vs. Green's Heirs, 2 Wheat., 196; The United States vs. Perchman, 7 Pet. 51; Mitchell et al. vs. The United States, 9 Id., 711; Ladae vs. Roland et al., 2 How., 581; United States vs. Brooks et al., 10 Id., 442.*

The doctrine here laid down was fully sustained in a lengthy opinion in *The Iowa Homestead Co. vs. Webster County, 21 Iowa, 221; Dubuque & Pacific R. R. Co. vs. Same, Id., 235; and in Cedar Rapids, &c., vs. Woodbray County, 29 Id., 247.*

It is clear, therefore, that the complainants' position, that the State in the first instance, and the company afterwards, had *a mere naked fee in trust* in these lands is not correct. The act of Congress constituted a present grant of the lands to take effect when selected and earned, and after being so earned and selected the company *had a fee simple absolute title to the same.* This title after that date was unrestricted in any way. The company could give the lands away, or sell them at their full or half their cash value,—make any disposition of them it pleased,—and over this power of disposition the government had no control.

In the county of Osceola, where these lands are situated, there are 368,640 acres of land. Under this act of Congress there was granted to the Grand Rapids and Indiana Railroad

Company in that county, 93,029.01 acres, and to the Flint and Pere Marquette Railway Company, 29,254.35 acres, or a total to those two companies, as shown by the records in the Land Commissioner's Office, at Lansing, of 122,283.36 acres; *or about one-third of the entire lands in the county.*

Kansas, &c., R. R. Co. vs. Kulp, 9 *Kan.* 38.
State vs. Dalle, 48 *Mo.* 282.
U. P. R. R. Co. vs. Lincoln County, 1 *Dill.* 314.

Veeder vs Supply 3 Wis 502 all., 603, in no way conflicts with the position we have taken.

Under the grants in that case it was expressly provided that before *any* of the lands granted under the act were conveyed, the company should first pay into the Treasury of the United States the cost of surveying, selecting, and conveying the same, etc. And the original act contained a provision that any of these lands not sold by the company within three years after the final completion of the road, should be liable to be sold to actual settlers under the pre-emption laws, at a dollar and a quarter per acre, the money to be paid to the company.

The court held that under the first provision no title vested in the company until the required pre-payment was made, and that under the provision relating to sales to settlers the land could not be sold for taxes as it would divest this right.

Now assuming that these companies had earned all these lands,—several years before the final completion of their roads,—and had not sold them. And we have a right to suppose an extreme case for illustration: *We would then have two corporations owning in fee simple, one-third of the entire lands of a county, and such lands exempted from taxation.*

This is so startling that we may well ask, can the Legislature do this great wrong?

We may concede that until these lands were earned, and the company thus acquired a title in fee simple that the Legislature could exempt them,—because of a possibility of a reversion to the government.

We may also concede that the Legislature could, *by a general law, applicable to all corporations*, exempt a certain class of property owned by them.

BUT THE LEGISLATURE CANNOT EXEMPT THE PROPERTY OWNED AND HELD BY ONE OR MORE PARTICULAR CORPORATIONS, AND TAX SIMILAR PROPERTY OWNED BY OTHER LIKE CORPORATIONS.

"The Legislature shall provide an uniform rule of taxation, except on property paying specific taxes, and taxes shall be levied on such property as shall be prescribed by law."—*Constitution of Michigan, Art. XIV., § 11.*

This provision is simply a principle of Constitutional law which is inherent in the power to tax. It is of the very essence of taxation that it be not only equal but uniform. Taxation is a common burthen, and there should be common contribution to discharge it.

Cooley on Const. Lim., 490.

"The essential characteristics of any system of taxation (properly so called) are *certainty, equality, universality*. All the persons or property within a State, district, city, or other fraction of territory, having a local sovereignty for the purpose of taxation, should, as a general rule, constitute the basis of taxation. If the tax be upon real estate, the value of the real estate should be the measure of taxation. As has been elsewhere said, the general rule knows nothing about partial assessments for benefits, or the selection of a *portion* of a class." Per DUNKIN, Ch., in *State vs. City Council, 12 Rich., S. C., 732.*

"With the single exception of specific taxes," says Christiancy, J., in *Woodbridge vs. Detroit, 8 Mich., 301*, "the terms 'tax' and 'assessment' both, I think, when applied to property, and especially to lands, always include the idea of some ratio or rule of apportionment, so that of the whole sum to be raised, the part paid by one piece of property shall bear some known relation to, or be affected by, that paid by another. Thus, if one hundred dollars are to be raised from tracts A, B, and C, the amount paid by A will reduce by so much that to be paid by B and C, and so of the others.

"In the case of specific taxes, as well as duties and imposts, though the amount paid by one is not affected by that paid by another, yet there is a known and fixed relation of one to the other, a uniform rate by which it is imposed *upon the whole species or class of property or persons to which the specific tax applies;* and this is so of duties and imposts, whether specific or *ad valorem*. To compel individuals to contribute money or property to the use of the public, *without reference to any common ratio*, and without requiring the sum paid by one piece or kind of property, or by one person, to bear any relation whatever to that paid by another, is, it seems to me, to lay a forced contribution, not a tax, duty, or impost, within the sense of these terms, as applied to the exercise of powers by any enlightened or responsible government."

"The constitutional requirement of equality and uniformity only extends to such objects of taxation as the Legislature shall determine to be properly subject to the burden. The power to determine the persons and the objects to be taxed is trusted exclusively to the Legislative department; *but over all those the burden must be spread, or it will be unequal and unlawful as to those who are selected to make the payment.*"

Cooley's Const. Lim., 515.

The Legislature of Illinois, in amending the charter of

Cairo, provided that its inhabitants should be exempt from performing labor on the roads beyond the city limits, or taxes to procure labor for such purpose; and the property within the city should be exempt from taxes levied for county purposes, *provided the city should support the resident paupers thereof, and pay the expenses of the Circuit Court in all criminal cases for offenses committed by citizens, and all jail fees accruing therefrom.*

The county levied the same rate of taxes upon property in the city, as on other property beyond its limits, for county purposes, *although the city had complied with the charter exempting property owned in the city from a county tax.*

The provisions of the Illinois Constitution were as follows:

"The General Assembly shall provide for levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his or her property."

"The corporate authorities of counties, townships, school districts, cities, towns, and villages, may be vested with power to assess and collect taxes for corporate purposes, such taxes to be uniform in respect to persons and property, within the jurisdiction of the body imposing the same."

The court say,—"These provisions were manifestly inserted in the fundamental law, for the purpose of insuring equality in the levy and collection of the taxes to support the government, whether levied for State, county, or municipal purposes. The design was to impose an equal proportion of these burdens upon all persons within the limits of the district. *Under these provisions the Legislature has no power to exempt or release a person or community of persons from their proportionate share of these burthens.* Not having such power themselves, they are unable to delegate such power to these inferior bodies. In the case of *O'Kane vs. Treat et al., 25 Ill., 561*, it was held, that a provision exempting persons residing in a city from a tax levied to repair roads beyond the city limits, by township authority, was repugnant to the Con-

stitution."—*Hunsaker et al. vs. Wright et al, 30 Ill., 146.*

It is of the very essence of taxation that it be levied with equality and uniformity. The burden is common; all, therefore, should aid in bearing the burden, and contribute to its discharge.

In *Weeks vs. Milwaukee, 10 Wis., 242,* it appeared that several lots in the city, upon which a new hotel was being constructed, of the value of from $150,000 to $200,000, were purposely omitted to be taxed under the direction of the Common Council "in view of the great public benefit which the construction of the hotel would be to the city." The court held that this exemption was illegal.—See, also, *Gilman vs. City of Cheboygan, 2 Black, 510,* and cases there cited.

Again our Constitution provides that "Corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes."—Act XV, § 1.

Can the Legislature by a general law authorize the formation of corporations, and afterwards by a special act confer special powers, privileges or immunities upon one or more of the corporations so formed?

The exemption from taxation in this case is a particular privilege not conferred upon railroad corporations generally.

Constitutional principles require statutes to be general in their operation. I do not now speak in reference to any special constitutional provision. Would a statute be constitutional which selected particular individuals from a class or locality, and imposed upon them special obligations or burdens, while others of the same class were exempt therefrom? If not, can the Legislature exempt particular individuals, or suspend the operation of general laws for the benefit of particular individuals? "On principle it can never be within the bounds of legitimate legislation to enact a special law or pass a resolve dispensing with the general law in a particular case, and granting a privilege or indulgence to one man, by way of exemption from the operation and effect of such general law, leaving all other persons under its operation. Such a law is neither just or reasonable in its consequences. It is our boast that we live under a government of laws, and not of men; but this can hardly be deemed a blessing, unless those laws have for their immovable basis the great principles of constitutional equality. Can it be supposed for a moment that, if the Legislature should pass a general law, and add a section by way of proviso, that it never should be construed to have any operation or effect upon the persons, rights, or property of Archelaus Lewis or John Gordon, such a proviso would receive the sanction or even the countenance of a court of law? And how does the proposed case differ from the present? A resolve passed after the general law can produce only the same effect as such proviso. In fact, neither can have any legal operation." *Lewis vs. Webb,* 3 *Greenl.* 326. *In Wally's Heirs vs. Kennedy,* 2 *Yerg.* 554, it is said "The rights of every individual must stand or fall by the same rule or law that governs every other member of the body politic or land, which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar

and seventy-one, and until after three years from the date of the certificate showing that such lands have been earned by said railroad company, after which time said lands shall be taxed as other lands except as hereinafter provided."'

These lands did not come within the next proviso, so that it is unnecessary to quote it.

Sec. 50 of this act reserved the right to alter, amend, or repeal it at any time. This right the State had under sec. 1 of Art. XV. of the Constitution.

It cannot, however, be seriously claimed that anything in sec. 37 contained an irrevocable contract with this company.

This section is open to all the objections urged against the act of 1857, except that the provision in this case is clear.

III.

THAT UNDER ARTICLE XIV. OF THE CONSTITUTION OF MICHIGAN RELATING TO SPECIFIC TAXES, THE PROPERTY OF RAILROAD COMPANIES IS LIABLE TO SPECIFIC TAXATION ONLY, AND THAT THE LEGISLATURE COULD NOT THEREFORE AUTHORIZE THE TAXATION OF THE LANDS IN QUESTION IN THE MANNER ATTEMPTED IN THIS CASE.

The Constitution of Michigan provides that "The State may continue to collect all specific taxes accruing to the treasury under existing laws. The Legislature may provide for the collection of specific taxes from banking, railroad, plank-road, and other corporations hereafter created."

Sec. 10, Art. XIV.

This section of the constitution must be construed in the light of the legislation in force at the time of the adoption of this instrument.

It is claimed by counsel for complainant that the plain intent of section one of this article is to create a fund, and place the same entirely beyond legislative control, and that section ten must be interpreted with reference to that intent; that the Legislature must carry out that intent, and cannot by changing the mode of taxation defeat the intent as thus expressed in section one.

The premises here assumed are not correct, hence the conclusion drawn does not follow.

The Supreme Court of Michigan construed section ten in *Walcott vs. The People, 17 Mich., 79.*

The action was brought to recover from the defendant below, who was agent of the American Express Company, a co-partnership, having its principal office in the city of New York, the penalty prescribed for the violation of the provision of *Act No. 140, Sess. Laws 1867.*

This act required the company to pay into the State treasury a specific State tax of one per cent, on the gross receipts received by said company within the State for the year,—included in the report made by the company,—as a condition precedent to the right to do business.

It was insisted on behalf of the company that section ten contemplated that no specific tax should be collected except from "banking, railroad, plank-road, and other corporations hereafter created."

The court say,—"Upon turning to the Constitution, it will be observed that the first clause of *sec. 10*, before mentioned, declares expressly that the State may continue to collect all specific taxes accruing under existing laws. Several of the laws thus referred to were of long standing, and imposed taxes upon business. Many of them applied to individuals and not to corporations. The clause cited had the effect to 'continue'

these taxes. It was a constitutional declaration in favor of specific taxes on the business of individuals, in so far as the same were then required by existing laws."

In speaking of the second clause in the section, the court say,—"It is not denied that the first branch of the section is permissive and not prohibitory; that it was intended as an express authority to continue the collection of specific taxes, under the Constitution, to the extent then allowed by law; and it cannot be denied that the clause standing with it, and which is relied upon by the plaintiff in error, as excluding the right to impose specific taxes, by subsequent laws, on anything except corporations, *is conceived in language appropriate to a grant of power and not to a limitation.* The position of the passage, and the admitted scope of the passage associated with it, and the natural and ordinary meaning of the language concur in giving an interpretation opposed to inhibition."

And the court held under this construction that the Legislature could require copartnerships to pay a specific tax upon their *business.*

But, under such a construction, does it follow that the Legislature must impose such a tax? Clearly not.

Under the construction given this section by our court, the Legislature could impose specific taxes upon the business carried on by copartnerships, individuals, and corporations. If it was so provided, the first section of this article of the constitution would apply to the moneys thus collected; but the Legislature, instead of imposing a specific tax, could omit the same, and require all corporations to pay an annual tax upon their property and assets in lien thereof.

And to say that a tax thus collected would defeat the intent of the first section cannot be maintained. The interest upon the Primary School, University, and other educational funds, we cannot presume the Legislature would omit or fail to provide for.

The specific tax provided for in section 20 of the act of Feb. 14, 1857, "is a specific annual tax of one per cent upon the cost of the road and its equipments and appurtenances of whatever kind."

Now it is very clear that in making an estimate under this section upon which to pay this tax, the companies *would not include therein the value of these lands.*

So that while we may concede the Legislature could not impose both specific and direct taxes upon the same property of a corporation, yet we say that it may impose a specific tax upon a part of the property of a corporation, and a direct tax upon other property of the same corporation.

There is nothing in the Constitution to prevent this,—indeed the Constitution expressly recognizes this right.

"The Legislature shall provide an uniform rule of taxation, *except on property paying specific taxes.*"—*Sec. 11, Art. XIV.*

In the case of *Walcott vs. The People,* referred to, it appeared that the company had, for the purpose of transacting its business within the State, valuable property, both personal and real, at various points throughout the State, upon which property, taxes for State and local purposes were annually levied, assessed, and collected, as upon other property of equal value in the State.

Yet the court did not on that account recognize the fact that the payment of one of these taxes prevented the collection of the other.

The one was a tax upon the *business,* the other upon the *property.*

So in this case. There is not a double taxation.

Sections 7 and 20 of this act must be construed together,—the one as reserving the right to tax the lands owned by the company, which were not necessary to enable it to carry on its business by a direct tax; the other, as authorizing or imposing a specific tax upon the cost of the road, its equipments and appurtenances in lieu of a direct tax upon such property.

This question is so fully discussed in the briefs of my associates that it is unnecessary to pursue the subject any farther, or to examine the subsequent legislation relating thereto.

The other questions have been so fully discussed by my associates, that I could add nothing to what has already been said by them.

I submit that the decree of the court below shou'd be affirmed.

ISAAC MARSTON,
Of Counsel for the State of Michigan.

UNITED STATES OF AMERICA.

IN THE SUPREME COURT

OF THE

UNITED STATES.

October Term, 1874.

CHARLES R. TUCKER *et al.*,
Complainants and Appellants,
vs.
NELSON FERGUSON *et al.*,
Defendants and Appellees.

BRIEF FOR DEFENDANTS.

CHARLES UPSON,
Of Counsel for the State of Michigan.

LANSING:
W. S. GEORGE & CO., PRINTERS AND BINDERS.
1875.

THE SUPREME COURT

OF THE

UNITED STATES.

December Term, 1874.

CHARLES R. TUCKER,
OLIVER PRESCOTT, AND
SHEPHERD KNAPP,

Complainants and Appellants,

vs.

NELSON FERGUSON,
JOHN H. LANPHEAR,
WILLIAM BENNETT,
ELIAS C. MARTIN,
CHARLES F. DEREVAGE, AND
NATHANIFL CLARK,

Defendants.

BRIEF FOR DEFENDANTS.

The appellants in this cause filed their bill of complaint in the court below as trustees for the holders of certain bonds issued by the Flint and Pere Marquette Railway Company, which bonds are alleged to be secured by two mortgage and trust deeds executed by said railway company to said trustees upon the lands mentioned in the bill of complaint, and the object of the bill is to restrain the defendants, who are super-

visors of their respective townships in Osceola county, Michigan, where the said lands are situated, from assessing, levying, and collecting taxes on said lands. The defendants demurred to the bill, and the court below having sustained the demurrer and dismissed the bill, the complainants appealed from said order and decree.

I.

It is claimed in substance, and insisted upon by the complainants in their said bill in the first place, that the Flint and Pere Marquette Railway Company at the time of the execution of the said mortgage and trust deeds to complainants (Sept. 25, 1866, and Sept. 4, 1868), held the railroad grant lands in question, free and exempt from local taxation; that by the terms of the grant from Congress to the State of Michigan, and the subsequent legislation of said State in conferring said grant upon said railway company, and the acceptance of the same, and the construction of its railroad by said company, as stated in the bill, an irrevocable contract was made by the State of Michigan with said company, that said lands, while they should remain unsold by said company, should be held free from local taxation; and that by that clause in the Constitution of the United States forbidding States from passing laws impairing the obligation of contracts, the State is prohibited from passing any act authorizing the taxation of said lands.

We submit that the case made by the bill shows no such irrepealable contract between the State of Michigan and the Flint and Pere Marquette Railway Company, exempting these lands from taxation.

By the statements in complainants' bill, it appears that the Flint and Pere Marquette Railway Company was organized in 1857, and prior to the 14th day of February, of that year, under the General Railroad Law of Michigan, which was approved February 12, 1855, and that the line of its contemplated road was about 170 miles.

By section 1 of Article XV. of the Constitution of the State of Michigan, which has been in force since January 1, 1851, it is provided that, "Corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes. All laws passed pursuant to this section, may be amended, altered, or repealed."

Also by section 3447 of the Compiled Laws of Michigan, 1871, Vol. 1, page 1152, which section has been in force since 1839, it is provided, that "every act of incorporation passed since the twentieth day of April, in the year one thousand eight hundred and thirty-nine, or which shall be hereafter passed, shall at any time be subject to amendment, alteration, or repeal, at the pleasure of the Legislature; *Provided*, That no act of incorporation shall be repealed unless for some violation of its charter or other default, when such charter shall contain an express provision limiting the duration of the same."

The Flint and Pere Marquette Railway Company, therefore, was organized subject to these provisions, the same as if it had been created by special charter, in which these clauses were embodied.

Penn. College Cases, 13 Wall., 213.

Keeping in view this subjection of the Flint and Pere Marquette Railway Company to the control of the Legislature from its first organization, let us consider the history of this Congressional grant and of the legislation in regard to it.

The grant of these lands was made to the State of Michigan by act of Congress of June 3, 1856 (U. S. Statutes at Large, Vol. II., page 21) which provided in the fourth section thereof that "if any of said roads is not completed within ten years no further sales shall be made, and the lands unsold shall revert to the United States." An extension of time was granted by joint resolution of Congress of February 17, 1865,

(Statutes at Large, Vol. XIII., page 569) and a further extension to March 3, 1876, by act of Congress of March 3, 1871. (Statutes at Large, Vol. XVI., page 582.)

In the second section of this last-mentioned act it was provided, "That in case said railroad shall not be fully completed from Flint to Lake Michigan within the time as extended by this act, all the lands included in said grant, to which the right of sale shall not then have attached, shall revert to the United States."

Whatever construction might have been put upon the language of the grant originally, it is clear from the terms of this last act, that after March 3, 1871, none of the lands in the grant to which the right to sell had once attached in the hands of the railway company could ever revert to the United States, but the railway company would hold them by title absolute in fee simple, and with liability to local taxation unless expressly exempted.

Congress also by this subsequent legislation would seem to have indicated its approval of the prior disposition of these lands made by the Legislature of Michigan to the Flint and Pere Marquette Railway Company, and by the second section of an act approved July 3, 1866 (1st Session 39th Congress, 1865–1866, page 78,—Little, Brown & Co.'s edition) the Flint and Pere Marquette Railway Company is specially named, and other railroad corporations in the Lower Peninsula of Michigan are also referred to as having an interest in the respective railroad grants made to the State of Michigan, and by the State to these companies.

By section twelve of the act of the Legislature of the State of Michigan, approved February 14, 1837 (page 346, Laws of 1857, which act granted these lands to said Flint and Pere Marquette Railway Company, it is provided that said company, "at all times and in all manners," should be subject to the laws of said State, and to such rules and regulations as may from time to time be enacted and provided by the Legis-

lature of the State of Michigan in regard to the management and disposition of the said lands, not inconsistent with the provisions of said act and the act of Congress granting said lands to the State, and should be entitled to all the privileges and immunities conferred by said laws, and also provided that nothing contained therein should be so construed as to relinquish the right of the State to any specific tax imposed upon any railroad company within the State.

By section seven of said act it was declared that none of the lands so granted to the company should be liable to taxation for seven years from the first day of September then next; except such parts and parcels thereof as should be actually sold by said company pursuant to the provisions of said act, or such as should be improved.

By section sixteen of said act it was provided that said company should take said grant of land with the conditions imposed and incumbrances specified in said act, and should in no court have any claim or recourse upon the State for a misapplication of said grant, or for any of the incumbrances in said act imposed.

Section five of said act specified the manner in which the company should manifest its acceptance of said grant under the act, and said company, as averred in said bill, did so accept the same on the second day of April, 1857.

If then there was any contract entered into between the State and said railway company at the time of said acceptance, in regard to the exemption of said lands from taxation, it was subject to the above provisions, and it was also, on its face, only an agreement that the said lands should not be taxed while held by the company, and unimproved for seven years from September 1, 1857, which was plainly expressive of the right and intention of the State to tax them after that time should the Legislature see fit to do so.

In addition to said intimation and recognition of the right of the State to tax these lands after this seven years' postpone-

ment, it was also provided in section twenty of said act of February 14, 1857, that said company should pay to the State a specific tax of one per cent upon the cost of the road and equipments, with liberty to the Legislature, after ten years, to impose a further tax of not exceeding two per cent upon the gross earnings of the road; and this was also assented to by the company in so accepting said grant, and said specific taxes were to be in lieu of all other taxes to be imposed within said State.

This provision, taken in connection with the clause in section 7 of the same act, in regard to taxing the lands after seven years from September 1, 1857, shows that the Legislature at that time recognized and made a distinction in taxation between the franchise of the company, with its road bed, buildings, and property necessary to aid in the actual use and enjoyment of its franchise as a railway company, and the lands which it might hold under the land-grant or otherwise, in common with all other owners of or dealers in land generally, as an investment or for profit; lands which were not necessary for it to hold in the use and enjoyment of its franchises as a railway company; and this distinction is also kept up and repeated in the amendatory act of the Legislature of Michigan of Feb. 14, 1859 (Laws of 1859, page 442), where this clause in regard to the seven years' exemption is still found retained, and immediately after in section 2 of said amendatory act is added this clause, viz: "Said companies shall be subject to the same rate of taxation only, and in the same manner as is provided in section forty-five of 'an act to provide for the incorporation of railroad companies,' approved February 12, 1855," which rate of taxation referred to was a specific annual tax of one per cent on the capital stock of said company paid in. The Legislature thus carefully keeps up and recognizes the distinction between those lands which are part and parcel of the company in the exercise of its franchises and lands which it holds as an investment or for profit, and considers

that in taxing the *company* it does not tax these lands in question, but leaves them subject to taxation after the expiration of the seven years, in common with other lands generally, and reasserts its right to tax them after that time if it sees fit.

This distinction or division of real estate held by corporations into two classes, is also expressly pointed out in the State Constitution of Michigan in article XV., section 12, which prohibits corporations from holding real estate for a longer period than ten years, "*except such real estate as shall be actually occupied by such corporation in the exercise of its franchises.*" It is again indicated in the last clause of section 9 of Article XIX. of said constitution in relation to mining corporations, as follows: "No such corporation shall be permitted to purchase or hold any real estate, *except such as shall be necessary for the exercise of its corporate franchises.*" This last species of real estate only, is considered as a part of the corporation, and as taxed when the company is taxed, while other lands owned by the corporation remain liable to local taxation the same as all other real estate generally, and contracts exempting the corporation from taxation are limited accordingly.

Wilmington R. R. v. Reid, 13 Wall., 264.
Worcester v. Western R. R., 4 Met., 564.
Vt. Cent. Ry. v. Burlington, 28 Vt., 193.
State v. Mansfield, 3 Zabriskie, 510.
State v. Newark, 1 Dutcher, 315, and 4 Dutcher, 519.
Railroad v. Berks. Co., 6 Barr, 70.
N. Y. & Erie R. R. Co. v. Sabine, 26 Pa. St., 242.

But the clause in section 2 of the act of February 14, 1859, which provides that said company should be subject to the same rate of taxation only, and in the same manner as provided in section 45 of "an act to provide for the incorporation of railroad companies," approved February 12, 1855, was also invalid by reason of being in violation of section 14 of Article XIV. of the Constitution of the State of Michigan, which is as follows: "Every law which imposes, continues, or revives a

tax, shall distinctly state the tax and the object to which it is to be applied; and it shall not be sufficient to refer to any other law to fix such tax or object."

The act of February 12, 1859, does not distinctly state the tax, and it is impossible to determine it without referring to the other law, and this vicious system of legislation the constitution prohibits, and requires the legislators to have before them in the act itself the distinct tax on which they are to vote. See also on this point Walcott vs. The People, 17 Mich., 68.

This left the specific taxation of the company as provided for in section 20 of the act of February 14, 1857, but said section 20 was afterwards, on the 15th day of February, 1859 (Laws of 1859, page 558), repealed.

But the rate of specific taxation provided for in the General Railroad Law of 1855 was, as we have seen, made subject to amendment, alteration, or repeal, both by the State Constitution and the general statute hereintofore referred to, and the right to tax the lands was not renounced or disclaimed.

"It is unquestionable," says Mr. Redfield, "that the Legislature may, in the charter of a corporation, fix the rate of taxation for the time being, and subsequently repeal the provision and subject the company to a higher rate of taxation, and unless exclusive terms are used in regard to a provision limiting the rate of taxation, it will be regarded as temporary."

Redf. on Rys., 1st ed., page 533.
Ohio Trust Co. v. Debolt, 16 How., 416.
Easton Bank v. Cone, 10 Barr., 443.

But when a right of repeal or amendment is reserved in the constitution or in the charter, or in a prior general statute, its exercise by a subsequent legislature is no violation of the Constitution of the United States.

"Cases often arise where the Legislature in granting an act

of incorporation for a private purpose, either make the duration of the charter conditional or reserve to the State the power to alter, modify, or repeal the same at pleasure. Where such a provision is incorporated in the charter, it is clear that it qualifies the grant, and that the subsequent exercise of that reserved power cannot be regarded as an act within the prohibition of the constitution.

"Such a power, also, that is, the power to alter, modify, or repeal an act of incorporation, is, frequently, reserved to the State by a general law applicable to all acts of incorporation, or to certain classes of the same, as the case may be, in which case it is equally clear that the power may be exercised whenever it appears that the act of incorporation is one which falls within the reservation, and that the charter was granted subsequent to the passage of the general law, even though the charter contains no such condition, nor any allusion to such a reservation."

Penn. Coll. cases, 13 Wall., 190—213.
Tomlinson v. Jessup, 15 Wall., 454.
Miller v. The State, 15 Wall., 478.
Holyoke Co. v. Lyman, 15 Wall., 500.

The three cases last quoted from the 15th Wallace would seem on principle to cover this case in all its aspects, and to be conclusive of it against the company; and see Head vs. University, 19 Wall., 526.

But where no statutory or constitutional reservation of power to alter, amend, or repeal, has been made, it is certain that in any case there must be a consideration for the contract of exemption from taxation, so that the State can be supposed to have received a beneficial equivalent, and if the exemption is made as a privilege only, it may be revoked at any time.

Christ's Church v. Phil., 24 How, 300.
Brainard v. Colchester, 31 Conn., 410.
Cooley's Const. Lim., page 281.
State v. Dulle, 48 Mo., 282.

Concessions, then, or exemptions from taxation that may have been made to this railway company by the State Legislature since the company accepted the grant, without imposing any additional burdens or receiving any new or additional consideration therefor, cannot be claimed to be perpetual, or in the nature of irrepealable contracts with the company.

By section seven of the act of February 14, 1857, conferring this land grant upon this company, it was allowed to sell only sixty sections of land after the completion of each twenty continuous miles of its railroad, until after the full and final completion of its road, but the amendatory act of the Legislature of Michigan of February 14, 1859 (Laws of 1859, page 442) gave the company permission to sell 120 sections, or double the amount of land originally authorized to be sold by the act of 1857 for every 20 continuous miles of its road completed, but still retained the clause in relation to taxing the lands after the expiration of the seven years.

The amendatory act of March 11, 1861 (Laws of 1861, page 150), omitted from section 7 the clause in regard to exempting the lands from taxation for seven years, and hence it might be argued that the State, if it had seen fit, might have taxed these lands before the year 1873, if they had been previously earned by the company, as we have shown that these lands are not taxed by the specific tax imposed on the company, but are held by it as an investment, and are not necessary to it in the exercise of its corporate franchises. The specific tax was also imposed by the same act that asserted the right to tax these lands as lands separate and distinct from the tax on the corporation.

The grants and concessions made by the Legislature to the company in 1861 were spontaneous, and no additional service or duty, or other remunerative condition was imposed on the corporation.

There was no express agreement, nor any necessary implication from the facts in the case, that the amendments in the

act of 1861 should forever exempt these lands from taxation while held by the company.

Such an interpretation is not to be favored, and such concessions belong to a class of statutes in which the narrowest meaning is to be taken which will fairly carry out the intent of the Legislature.

Christ Church v. Phil., 24 How., 300.
Tomlinson v. Branch, 15 Wall., 460.
Walcott v. People, 17 Mich., 83.

That there was no irrepealable contract in regard to taxing these lands growing out of the legislation of the State of Michigan in regard to this grant to the railway company, subsequent to the act of February 14, 1857, which originally provided for their taxation after seven years, the case of Christ Church vs. Philadelphia, above quoted, would seem to be decisive, and especially when supported by the cases of Tomlinson vs. Jessup, Miller vs. the State, and Holyoke Co. vs. Lyman, in 15 Wall., 454, 478, and 500, hereinbefore referred to.

They also show that in this case no rights of third persons have vested so as to change the application of the rule. Whatever interests the complainants, or those whom they represent, may have in these lands, they acquiesced (as stated in Tomlinson vs. Jessup), with full knowledge of the evidence of the power reserved to the State to change the law in regard to taxation, and of the possibility of its exercise at any time in the discretion of the Legislature. Immunity from taxation in such cases, where constituting a part of the contract with the government, is, by the reservation of power, such as is contained in the Constitution of Michigan, and the act of 1859, subject to be revoked equally with any other provision of the charter whenever the Legislature may deem it expedient for the public interests that the revocation shall be made.

It is also a well settled rule of construction in cases of this

kind that the grant of privileges and exemptions to a corporation is to be strictly construed against the corporation and in favor of the people. Nothing passes but what is granted in clear and explicit terms.

Neither the right of taxation nor any other power of sovereignty which the community have an interest in preserving undiminished, will be held by the court to be surrendered, unless the intention to surrender is manifested by words too plain to be mistaken.

The relinquishment of the taxing power is never to be assumed.

Ohio Trust Co. v. Debolt, 16 How., 416.
Phil. & Wilm. R. R. Co. v. Maryland, 10 How., 376.
Prov. B'k v. Billings, 4 Pet., 514.
Chas. River Bridge, etc., 11 Pet., 420.
Rice v. R. R. Co., 1 Black, 359.
Jeff. Bank v. Skelly, 1 Black, 436.
Gilman v. Sheboygan, 2 Black, 510.
Wilmington R. R. v. Reid, 13 Wall., 264.
Tomlinson v. Branch, 15 Wall., 460.

But a special exemption from taxation when possessed by a corporation by legislative contract, is a franchise of the corporation like special charter privileges, which are contracts, and by the constitution of Michigan, Article XV. section 1, special charter privileges or franchises to a corporation, the Legislature is prohibited from granting, and no corporation organized in Michigan since the first day of January, 1851, the time when said constitution took effect, could obtain from the Legislature any special charter privileges or franchises.

The Supreme Court of Michigan has also indicated that section 10 of Article XIV. of the State Constitution was designed to prevent the Legislature from binding the State by any agreement to exempt such corporations from taxation. [Walcott vs. People, 17 Mich., 68.]

In this connection we will notice the statutes of Michigan in relation to the taxation of property.

By 1, Compiled Laws of Michigan, 1871, page 359, §§ 967 and 968, "All property, real and personal, within this State, not expressly exempted therefrom, shall be subject to taxation in the manner provided by law," and "real estate shall, for the purpose of taxation, be construed to include all lands in the State and all buildings and fixtures thereon, except in cases otherwise expressly provided by law." This has been the language of the Michigan statutes since the adoption of the Revised statutes of 1846.

R. S. 1846, Chap. 20, page 102, Sec. 1.

Also, by Act 125 of the Session Laws of Michigan of 1873 (page 173), approved April 19, 1873, and by the provisions of Article III. of Act 198, of the General Railroad Law of 1873 (page 496), approved April 30, 1873, both of which acts took immediate effect. These lands in question are expressly made liable to taxation, and are directed to be assessed and taxed in the same manner that other lands in the State are assessed and taxed, and the last clause or section of said last-mentioned act, repeals the previous acts for the incorporation of railroad companies, and makes the provisions of said act applicable to all railroad companies organized under said prior general railroad laws.

Said General Railroad Law of 1873 also imposes the same annual tax upon the gross receipts of each of said railroad companies.

The theory of the complainant's bill in this case is that the titles to these lands passed by the act of Congress of July 3, 1856 to the State of Michigan, and by the act of the Legislature of Michigan of February 14, 1857, and the subsequent acceptance of it by the company, and their doings under it, to said railroad company, and this is undoubtedly correct, and

so far as the company has earned the lands the title is perfect and absolute.

R. R. Co. v. Smith, 9 Wall., 95.
Johnson v. Ballou, 28 Mich., 379.

By the averments in the bill it appears that these lands in Osceola County have been earned by the company, by its building 120 25-100ths miles of its line of road, in accordance with the terms of the grant, and that the same have been duly certified to the company, and that it has sold of the lands in said county about 17,705 72-100ths acres, and has unsold in said county, and "now belonging to said railway company," subject to the claim and lien of the complainants, as stated in their bill, 10,892 97-100ths acres of the lands embraced in said grant, and which are the lands covered by the bill. It also appears by the bill that said railway company has conveyed, by certain mortgage and trust deeds, the said lands to complainants as trustees.

The right to sell having attached to these lands, and been acted upon by the company, the object for which they were granted by the United States has been accomplished, and the lands are now held by the company discharged from the trust. The company, instead of selling them absolutely, has chosen to convey them as security for a loan, and have the benefit of a rise in their value, consequent on the completion of the road and the settlement of the country.

It holds them as an investment for profit, and there is no possibility of their reverting to the United States. Why, then, are they not subject to local taxation? See act of Congress of March 3, 1871. U. S. Stat. at Large, Vol. 16, p. 582.

II.

The complainants in their bill insist that if they are mistaken in their first position, then, under the act of the Legis-

lature of the State of Michigan revising the laws for the incorporation of railroad companies, approved April 18, 1871 (Laws of 1871, page 328), they claim that there is a grant in the nature of a contract exempting the lands in question from taxation for three years from April 1, 1871, which is irrepealable.

To this we reply, that the act of April 18, 1871, referred to, revising the General Railroad Law, was made, like its predecessor, subject under the constitution and the general statute of the State, to amendment, alteration, or repeal, and section 50 of the act itself also contains that express reservation, so that if the act granted any exemption or concession to the company, it was only as a privilege for the time being, and was in its nature of a temporary kind, and liable to be repealed or amended at any time at the pleasure of the Legislature.

Ohio Trust Co v. Debolt, 16 How., 416.
Penn. Coll. Cases, 13 Wall., 190,
and cases cited in 15 Wall., 454, 478 and 500.

By virtue of this reserved power, the Legislature of Michigan did change and supersede this law of 1871, by the act of May 1, 1873 (Laws of 1873, page 496), again revising the General Railroad Law, which act, amongst other things provided in section 3 of Article III. of said act, a different rate of taxation of said railway company by imposing an annual specific tax upon the gross receipts of all such railway companies, which tax was to be "in lieu of all other taxes upon the property of such companies, except such real estate as is owned and can be conveyed by such corporations under the laws of this State, and not actually occupied in the exercise of its franchises, and not necessary or in use in the proper operation of its road;" and all such lands so excepted were made liable to local taxation the same as all other lands in the several townships where the same are situated, and by the last section

of the act it was made applicable to all railroad companies organized under the prior general railroad laws, and said laws were expressly repealed.

By act 125 (Laws of 1873, page 173) of the Legislature of Michigan, approved April 19, 1873, and which took immediate effect, it was also enacted that all lands in said State known as railroad lands, which may have been earned or obtained by any person, company, or corporation, by or for the construction of any railroad in said State, should "be assessed and taxed in the same manner that all other lands are assessed and taxed."

Under these provisions the defendants were justified in their action as supervisors and assessing officers.

But by the averments in complainants' bill, said railway company appears to have recognized the validity of said act of May 1, 1873, by paying over to the State the amount of the specific tax assessed upon it for 1873, under the provisions of section 3 of Article III. of said act, amounting to $23,446 50, which rate of taxation is a very different one from that provided by the act of 1855, or of 1871, and which act of 1855 was not repealed by the act of 1871, both acts being found in full in the Compiled Laws of 1871, but both of which were repealed by the act of 1873 in its concluding section.

It is difficult to see how the company could accept the law of 1873 as valid, for the specific tax it imposed in section 3 of Article III., without at the same time accepting the clause or condition for the taxation of these lands, which is contained in the same section and is a qualification of the same.

III.

It is further claimed by complainants in their said bill, that under the Constitution of Michigan, Article XIV., the property of railway companies therein is liable to specific taxation only, and that it is not competent for the Legislature of said

State to change the manner and mode of taxation in respect to such property.

In reply to this, it is submitted that the clause in section 10 of Article XIV. of the State Constitution in relation to specific taxes on railroad companies is applicable only to the franchise, and the property, real and personal, necessarily owned and occupied by the company in the exercise of its franchise, and not to real property which it may own which is not necessary or in use in the proper operation of its road. This is clearly recognized, as we have seen in section 12 of Article XV. of the Constitution in regard to corporations, and also in section 9 of Article XIX. It is also specifically pointed out in section 7 of the act of February 14, 1857, conferring this grant of land on the company, as section 20 of the same act provided for a specific tax upon the company in addition to the taxation of the lands referred to in said section 7, and the distinction is again repeated more pointedly in the General Railroad Law of 1873, of May 1, and in the act of April 19th, 1873, to which we have referred.

It is only such property belonging to a railroad corporation as is appurtenant to the construction and preparation of the road for use, or necessary to the enjoyment of its franchises that can claim to be covered by the specific tax imposed on the company.

Such property as is only indispensable to the making of profits is liable to taxation like other property. (Wilmington R. R. vs. Reid 13, Wall., 264), and cases hereinbefore referred to on this point. (See also State vs. Flavelle, 4 Zab., 370, and State vs. Leester, 4 Dutcher, 103, and also the same principle recognized in Home of the Friendless vs. Rouse, 8 Wall., 439, and Washington University vs. Rouse, 8 Wall., 439, and Dubuque & Pacific R. R. Co. vs. Webster county, 21 Iowa, 235.

But the Supreme Court of Michigan has also indicated that section 10 of said Article XIV. of the State constitution is permissive only, and did not prohibit the Legislature from im-

posing specific taxes in other cases, and that the clause was intended to prevent the Legislature from binding the State by any agreement to exempt such corporations from taxation.

Walcott v. People, 17 Mich., 68–82.

And we have seen that by the General Railroad Law of 1873 a specific tax is imposed on this railroad company, but not upon these lands, which are left subject to local taxation.

IV.

But it is also claimed by complainants in their bill that the State of Michigan received these lands under the act of Congress of June 3, 1856, in trust to dispose of the same only to aid in the construction of the railroad, for which the same was granted, and for no other purpose, and that it is a violation of this trust to tax them before they have been sold by the railway company.

To this it may appropriately be said that it will be time enough to consider that objection when the United States shall raise it, but it does not lie with the complainants to urge it. If the United States do not complain no other party has the right to do so. The railway company in accepting the grant agreed that these lands might be taxed in its hands after seven years, and if any right to object existed, it was waived when the company filed its acceptance of the grant with the Secretary of State in accordance with the provisions of section 5 of said act of February 14, 1857.

Baker v. Gee, 1 Wall., 332.

The language of the Congressional grant to the State of Missouri in this case last quoted is almost if not entirely identical in terms with the grant to the State of Michigan which we are now considering.

But it appears, as we have seen from the averments in the bill, that the railway company has earned the lands in question in accordance with the terms of the grant, and has received certified lists of the same, and has sold quite a quantity of the land in Osceola County, and holds the balance of these lands in that county subject to the mortgage and trust deeds of the same, it has made to the complainants. The title to these lands, therefore, has passed absolutely to the railway company. (See act of Congress of March 3, 1871, U. S. Statutes at Large, Vol. XVI., page 582.)

The same result, we insist, would have followed under the terms of the original grant, the company having the power to sell and convey a perfect title as soon as the lands were earned and certified, but this last act of Congress is conclusive on this point.

But the interest of the United States in this grant will not be claimed to equal that which it had in the railroad grant which was under consideration in the case of Thomson vs. Pacific R. R., 9 Wall., 599 and yet in that case the court say:

"But we think there is a clear distinction between the means employed by the government and the property of agents employed by the government. Taxation of the agency is taxation of the means; taxation of the property of the agent is not always, or generally, taxation of the means. No one questions that the power to tax all property, business, and persons, within their respective limits, is original in the States, and has never been surrendered.

It cannot be so used, indeed, as to defeat or hinder the operations of the National government; but it will be safe to conclude, in general, in reference to persons and State corporations employed in government service, that when Congress has not interposed to protect their property from State taxation, such taxation is not obnoxious to that objection."

In the case of Railroad Company vs. Peniston, 18 Wall., 5, the principles asserted in the foregoing decision of Thomson

vs. Pacific R. R. Co., were reaffirmed and made applicable as well in cases of corporations created by act of Congress, as by State authority, and where the grants and donations in aid of the railroad were made to it direct by Congress, and the corporation held them subject to the fulfillment and discharge of its obligations to the United States, and a tax imposed by the State upon the real and personal property of the Union Pacific R. R. Co., was held to be valid.

But lands originally public, cease to be public after they have been entered at the Land Office and a certificate of entry obtained, and are liable to taxation though no patent has issued, and the right to tax attaches as well to donation entries as to cash entries.

Carroll v. Safford, 3 How., 441.
Witherspoon v. Duncan, 4 Wall., 210.

Under the provisions of the act of Congress of June 3, 1856, granting these lands to the State of Michigan, no patent was required to pass the title, and none has since been required in the case of the lands granted to the Flint and Pere Marquette Railway Company by any of the subsequent acts of Congress reviving and continuing the grant. The case is therefore stronger in favor of defendants.

Rice v. Railroad Co., 1 Black, 358.
Railroad Co. v. Smith, 9 Wall., 95.
Railroad Co. v. Fremont Co., 9 Wall., 89.
Homestead Co. v. Valley R. R., 17 Wall., 153.
Johnson v. Ballou, 28 Mich., 279.

Under a grant of lands by Congress to the State of Iowa, similar in its terms to the grant in this case, and which the State had in like manner transferred to various railroad companies therein, it has been repeatedly decided by the Supreme

Court of that State that the lands are taxable in the hands of the company as soon as earned and lists certified.

Burlington and Mo. R. R. Co. v. Hayne, 19 Iowa, 137.
Iowa Homestead Co. v. Webster County, 21 Iowa, 221.
Dubuque and Pacific R. R. Co. v. Webster County, 21 Iowa, 235.
Cedar Rapids and Mo. R. R. Co. v. Woodbury Co., 29 Iowa, 247.
Courtright v. Cedar Rapids and Mo. R. R. Co., 35 Iowa, 386.

In the case in 19th Iowa, above quoted, the railroad company had also mortgaged the lands as in this case to raise money with which to build its road; and in the case in 21 Iowa, 235, the court also held that the specific tax of one per cent on the gross earnings of the railroad company imposed by the Iowa statute was in lieu only of taxes upon its track, rolling stock, and necessary buildings, and that all other property of the company should be taxed in the several counties in which it was situated, like that of individuals.

In reply to the closing allegation in complainants' bill, as to the effect of the tax upon the value of the bonds of the company, and upon the security held by complainants upon these lands, we quote the language of the Supreme Court of Pennsylvania in considering a similar objection urged by a party under somewhat similar circumstances:

"It is claimed, however, that the imposition of this tax impairs the obligation of the contract between the debtor and creditor; that to the extent of the tax it reduces the claim. All property, whether real, personal, or mixed, is subject to taxation, and although its value may be thereby lessened, yet every member of society knows that he must contribute to the support of the government in proportion to his means and the amount of property protected. The debt is no more sacred than the land which he has bought, and for which he has paid the State, yet in the absence of express contract, it is taxable

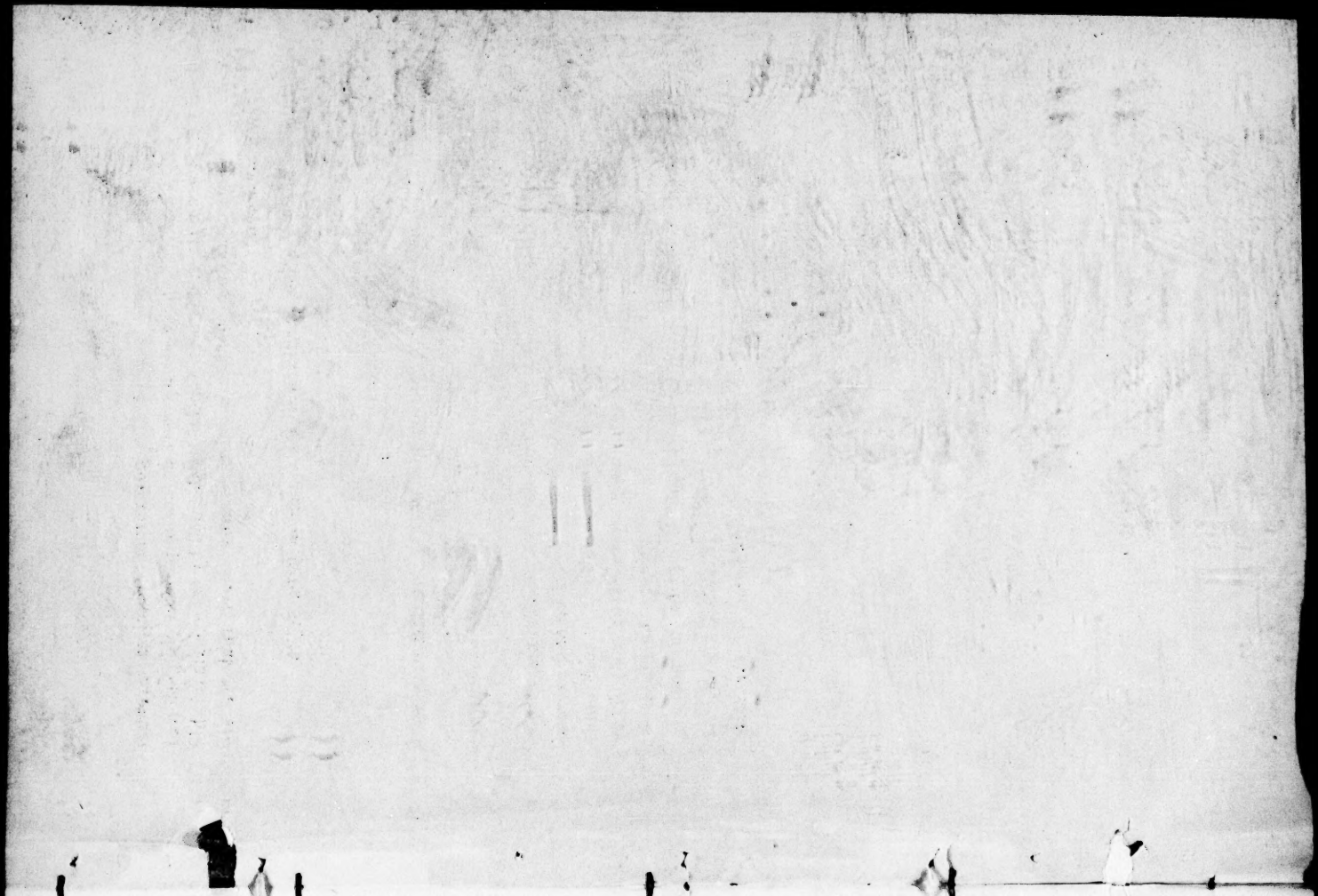
for all time, so long as the government requires revenue. * * * * That the tax laws do not impair the obligation of the contract, has been repeatedly decided by the courts of this State, and not held otherwise by any court that we are aware of."

Susquehanna Canal Co. v. Com'rs, 72 Pa. St., 72.

It is not claimed by the appellants that Congress in conferring the grant of these lands, imposed any restrictions on the State in regard to the taxation of the same, and it is submitted that the State of Michigan, in its legislation, has not relinquished its right to tax the same, and owing to the magnitude of these grants, it has a deep interest in asserting and exercising that right; that the complainants' rights in these lands are no greater than those originally possessed by the railway company from whom they claim to have derived their interest, and that the decree of the court below should be affirmed.

CHARLES UPSON,

Of Counsel for Defendants and for the State.



TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~384~~ 104

DAVID D. ROSS, AS ADM'R OF JOHN H. BULLS, DEC'D,
PLAINTIFF IN ERROR,

vs.

JONES, BROWN & COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

FILED DECEMBER 23, 1872.